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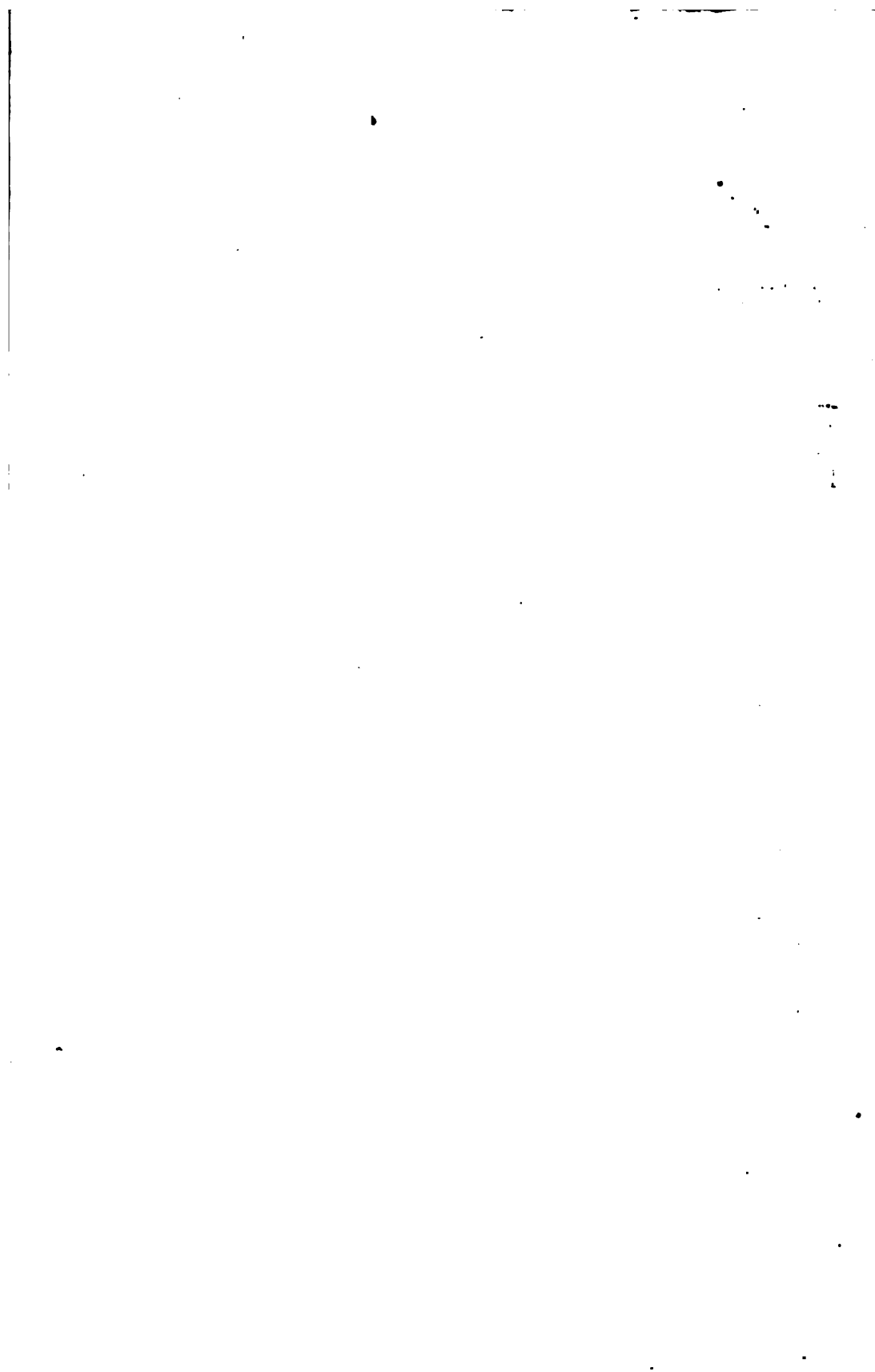
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Bombay High Court Reports.

VOLUME X.

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF BOMBAY.

1873.

EDITED BY

CHARLES W. L. JACKSON, B.A.

(OF THE INNER TEMPLE),

BARRISTER-AT-LAW.

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1873.

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The Honourable Raymond West.

The Honourable Robert Hill Pinhey.

The Honourable John Marriott.

The Honourable Nánábhái Hárídás.

ADVOCATE-GENERAL.

The Honourable Andrew Richard Scoble.

LEGAL REMEMBRANCER.

The Honourable C. J. Mayhew.

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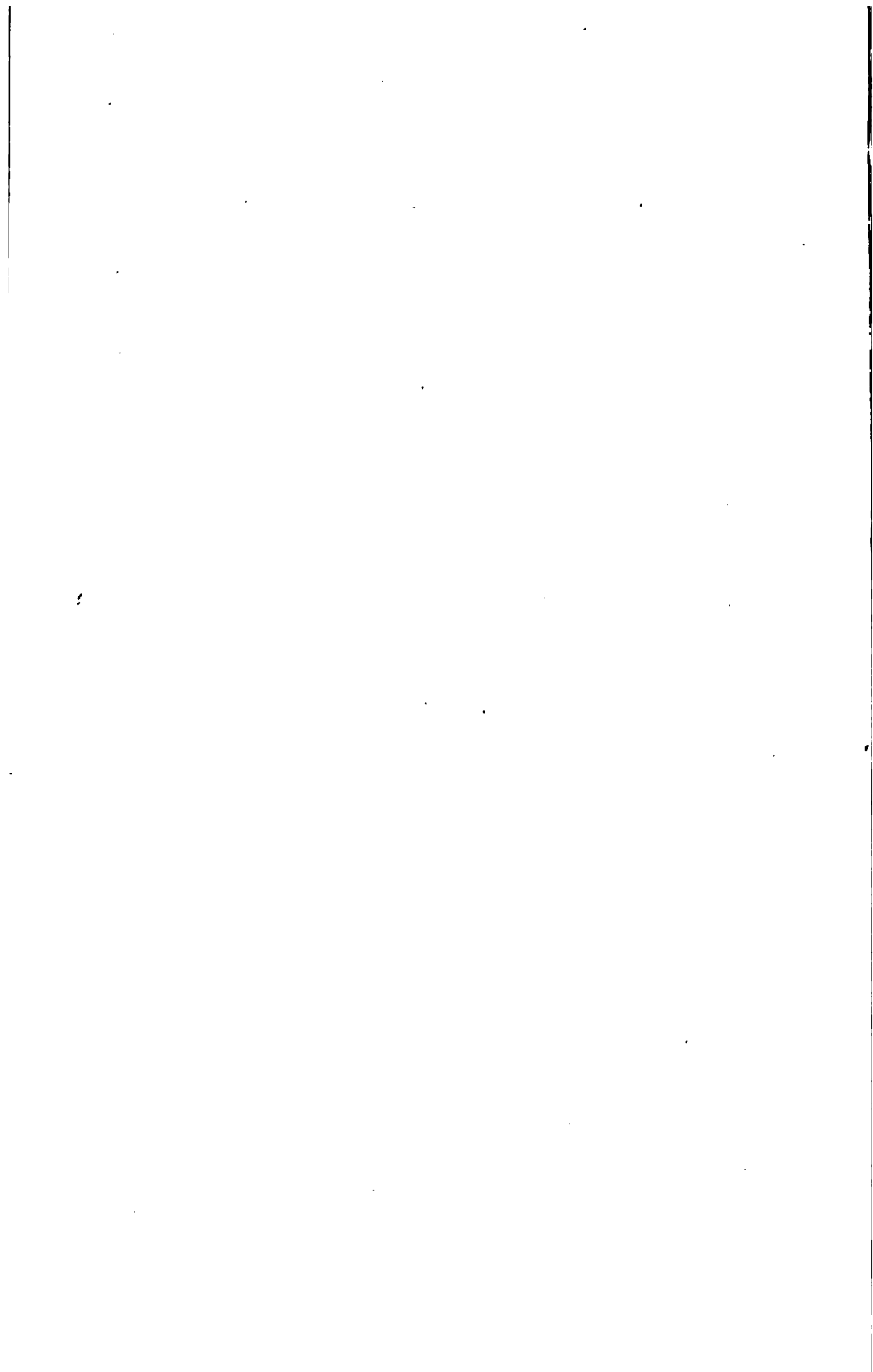
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„ (c), for "Jr." read "Ir."	„
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CASES

DECIDED IN THE

HIGH COURT OF BOMBAY.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 28 of 1871.

NA'RA'YAN DEV *Appellant.*
GAJA'NAN DIKSHIT and ANANDRA'V JOSHI. *Respondents.*

1873
January 14.

Security bond for restitution of property taken under decree—Decree reversed on special appeal—Surety's liability—Act XXIII. of 1861, Sec. 36.

A surety, who executes a security bond (in Form No. 82 of the High Court Circulars*) under Sec. 36 of Act XXIII. of 1861, is liable for the fulfilment of the decree, not only of the Court of Regular, but also of that of the Court of Special, Appeal.

THIS was a miscellaneous special appeal from the decision of R. H. Pinhey, Judge of the District of Puna, reversing the order of the First Class Subordinate Judge at that city.

The facts of the case were briefly these :—

Bhágirthibái obtained a decree against Náráyan Dev. The latter preferred an appeal, but before its disposal Bhágirthibái executed the decree,—Gajánan Dikshit and Anandráv Joshi becoming sureties for the restitution of the property, the subject matter of the decree, in case of its being reversed in appeal, and passing a bond under Section 36 of Act XXIII. of 1861 (substituted for Section 339 of Act

* High Court Circulars, Appellate Side, P. 247.

1873. **VIII. of 1859)** in the form prescribed by the High Court at page 247 of the "Book of Circulars." In the Court of regular appeal, the decree in favor of Bhágirthibái was upheld, but that decree was set aside in the Court of special appeal.

NA'RA'YAN
DEV
v.
GA'JA'NAN
DIKSHIT.

Thereupon Náráyan Dev, the present appellant, applied to the Subordinate Judge at Puna for an order directing the present respondents, Gájánan Dikshit and Anandráv Joshi, to restore the property taken from him under the decree. The respondents, under the circumstances, objected that they were not liable to do so. Their objection being overruled, an appeal was made to the District Judge, who allowed the objection on the ground that the liability of the sureties had ceased upon the decision of the court of regular appeal in Bhágirthibái's favor.

The special appeal was heard by LLOYD and KEMBALL, JJ.

Rávsáheb V. N. Mandlik and Ganpatráv Bháskar for the special appellant :—The security bond is applicable to the ultimate decision which may be passed in the suit. The juxtaposition of Sections 338 and 339 of the Code of Civil Procedure affords no assistance to the right interpretation of the security bond. The fact of the regular appellate court confirming the decree of the court of first instance, does not determine the liability of the sureties, because that decision is not final. As long as there is a possibility of that decision being reversed, so long their liability continues.

Shántáráam Náráyan for the special respondents :—Looking to the unambiguous wording of the form of the security bond in question, it is perfectly clear that the sureties bound themselves only to carry out the decree of the court of regular appeal, and not that of any other superior court. The appeal pending at the date of the bond, was the only appeal contemplated by the parties. They did not contemplate a special appeal or an appeal to the Privy Council. The words "by the said court" and the word "and" in Sec. 362 of the Civil Procedure Code show that the things secured are to be done at one and the same time. In Miscellaneous Special

Appeal No. 2 of 1869 (*Ratan Trimbak Patel v. Nasarvánji Hormasji and another*), WARDEN and GIBBS JJ. decided, on the 22nd December 1869, that the security bond ceased to have effect immediately after the District Judge gave his decree. This bond was under Sec. 338 of the Civil Procedure Code, but there is no substantial difference between it and a bond under Sec. 36 of Act XXIII. of 1861, which is the one in dispute in this case.

PER CURIAM:—The Subordinate Judge's order in this case should, we think, not have been interfered with.

Bhágirthibái was allowed to take the amount awarded to her on her furnishing security under Section 36 of Act XXIII. of 1861, "for the restitution of any property which might be taken in execution of the decree," and the respondents, Gajánanráv and Anandráv, became the required securities and entered into a bond in the Form No. 82 prescribed by the High Court, whereby they bound themselves, "if required by the said court," to restore all such property, viz., that which had been taken in the execution of the decree; and as, under Section 362 of the Civil Procedure Code, the Court of the Subordinate Judge was the court to which only application could be made for executing the decree of either of the appellate courts, whether "the said court," i.e., the Court of the Subordinate Judge, demanded such restitution in conformity with the decree of the District Judge or of the High Court, does not seem to affect the matter.

The case to which we have been referred is not on all fours with the present case. Security was therein taken under Section 338 of the Civil Procedure Code, and there is a marked distinction between the form of the security bond applicable to that section and the form of the bond now in question. We reverse the order of the District Judge, dated the 29th July 1871, and restore that of the Subordinate Judge, dated the 11th November 1870.

Order of District Judge reversed and decree of Subordinate Judge restored.

1873.

NA'RA'YAN
DEV
v.
GA'JA'NAN
DIXSHIT.



1873
January 30.

[ORIGINAL CIVIL JURISDICTION.]

DHURANDHARDA'S SAKHA'RA'M and others *Plaintiffs.*

BHA'U GOVIND and others*Defendants.*

Practice—Order made by Commissioner for taking accounts—Disobedience of order—Attachment.

An attachment will issue to compel a party to a suit to obey an order made by the Commissioner for taking accounts, upon the certificate of the Commissioner that such order has been made and disobeyed, without in the first instance making such order a rule of Court.

B.M. Wagle, on the 25th of November 1872, obtained from BAYLEY, J., a rule directed to the defendants, Bha'u Govind and Na'ra'yan Govind, whereby it was ordered that unless good and sufficient cause should be shown to the contrary, within four days from the personal service of the rule upon them, an attachment should be issued against the said defendants for contempt of court in not obeying a certain order of the Commissioner for taking accounts made on the 20th of January 1872, whereby it was directed that the said defendants should file in the Commissioner's office, within 28 days from the 20th of January 1872, the accounts of all dealings and transactions between them and the plaintiffs subsequent to the 30th of October 1864.

The above rule was issued upon reading the certificate of the Commissioner, dated the 19th of November 1872, which certified that by an order of court, made by consent on the 22nd of November 1871, it had been referred to the Commissioner to take an account of the dealings and transactions between the plaintiffs and defendants subsequent to the 30th of October 1864, and that at the request of the plaintiffs' attorneys, the Commissioner, on the 20th of January

1872, directed the defendants to file in his office, within twenty-eight days from the 20th of January 1872, the account of all dealings and transactions between them and the plaintiffs subsequent to the thirtieth day of October 1864, and that on the twenty-second day of March 1872 a warrant had been taken out by the attorneys for the plaintiffs, calling upon the defendants to show cause why they should not file the accounts as directed by the Commissioner on the twentieth day of January 1872, which warrant was returnable on the 2nd of April 1872, when the attorneys of the plaintiffs and the attorney for the defendants appeared on the return of the warrant, and the latter requested the Commissioner to grant the defendants further time for filing the accounts on the ground that certain books containing particulars relating to the said accounts were up-country ; and that the Commissioner then directed that the defendants should file their accounts in his office within twenty-one days from the 2nd of April 1872, and that on the 3rd of October 1872 a peremptory warrant had been taken out by the plaintiffs' attorneys calling upon the defendants to show cause why they should not file the accounts as directed on the 20th of January 1872, which warrant was returnable on the seventh of October 1872, when the plaintiffs' attorneys appeared before the Commissioner but no one attended on the part of the defendants, although the said warrant had been duly served, and that neither the defendants nor any persons or person on their behalf had filed in the Commissioner's office the accounts directed by the Commissioner to be filed by them on the 20th of January 1872.

1873
 DHURANDHAR-
 D'AS
 SAKHA'RAM
 v.
 BHATU GOVIND.

The rule came on for argument before BAYLEY, J., on the 20th of January 1873.

The Hon'ble A. R. Scoble (Advocate General), in showing cause, objected that the proceedings taken by the plaintiffs were irregular, inasmuch as an attachment for contempt would not issue for disobedience of an order of the Commis-

1873.
DEHURANDHAR
 DA'S
SAKHA'RA'M
 v.
BHA'U GO-
VINDA

sioner for taking accounts. He contended that the proper course for the plaintiffs to have adopted, was to have, in the first instance, applied to have the order of the Commissioner made an order of court, and if the order of court were not obeyed, then to have moved for an attachment. The course adopted by the plaintiffs in effect precluded the defendants from disputing the justness of the Commissioner's order. The objection was the more important from the fact that in many instances Commissioners appointed to take accounts were not officers of the court, and the parties had no safeguard against orders made improvidently by them. He commented on Secs. 180 and 181 of the Code, and referred to *Vakatchand Lakhmichand v. The Advocate General (a)*.

B. M. Wagla, in support of the rule, said that the procedure adopted in the present case was in accordance with the practice of the court, and that many similar rules had been granted and subsequently made absolute.

BAYLEY, J., said he would make inquiries and consult the other Judges before deciding the point that the Advocate General had raised.

Cur. adv. vult.

January 30, BAYLEY, J.:—With reference to the preliminary question that has been raised by the Advocate General in showing cause against the rule obtained by Mr. Wagla in this case, I may state that I have considered the point and made inquiries, and I am of opinion that the procedure followed by Mr. Wagla's client was quite correct, and in accordance with the practice of this court. (His Lordship then referred to several instances in which the practice adopted in the present case had been followed, and said)

I do not consider that the Advocate General's contention is based on reason, and must hold that the preliminary objec-

tion has failed and cause must be shown, if any can be shown, on the merits.*

Attorneys for the plaintiffs—*Shapurjee and Thakurdas*.

Attorney for the defendants—*C. Tyebji*.

1873.

DHURANDHAR
DA'S
SAKHA' RAM
V.
BHA'U GO-
VIND.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 674 of 1870.

ABDUL GANNE KA'SAM and others *Plaintiffs*.

HUSSEN MIYA' RAHIMTULA' and others ... *Defendants*.

1873.
January 31.

Muhammadan law—Wakf—Settlement on a man and his descendants—Perpetuity—Aulad dar Aulad—Warrasan.

Semle. To constitute a valid *Wakf* according to Muhammadan law, it is not sufficient that the word "*Wakf*" be used in the instrument of endowment. There must be a dedication of the property solely to the worship of God or to religious and charitable purposes. A Muhammadan cannot, therefore, by using the term "*Wakf*," effect a settlement of property upon himself and his descendants, which will keep such property inalienable by himself and his descendants for ever.

Held that the plaintiffs, who were sons of a daughter of one of the original settlers, did not come within the meaning of the term *aulad dar aulad* or the term *warrasan* used in the instrument of settlement.

THIS suit was filed by the plaintiffs to have the trusts of a writing in the Persian language, dated the 25th of October 1820, carried into execution.

II. For a declaration that the plaintiffs were entitled to live in a certain house mentioned in the said writing.

III. That the rights and interests of the plaintiffs and defendants in the said house might be ascertained and declared; and that, if necessary, the house might be sold and the proceeds divided amongst the plaintiffs and the defendants.

**Note.*—Before cause was shown on the merits the defendants lodged their accounts in the Commissioner's office, and on the 6th of March the rule was discharged, the defendants being ordered to pay the costs of and occasioned by it. Leave was granted to the defendants to file in the Commissioner's office the accounts they had lodged there.

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IV. For an account of the rents and proceeds of the house and of the application thereof by the defendants.

The translation of the Persian writing sued upon ran as follows:—

“The cause of writing this valid and legal declaration is as follows:—

We, namely, I named Jijibái, the daughter of Sheriff and the wife of Hussen Rahimtulá the deceased, and I named Muhammad and I named Ahmed and I named Abdullá the sons of Hussen Rahimtula—three brothers and one mother—making four, reside in Bombay. We make a valid declaration and a clear acknowledgment, being sound in mind, &c., as follows :—

There is a house (describing it) situated in Meman Wada street which is our own property and has been built by us four persons. At present we, the abovementioned four persons, have, willingly and of our own accord and with our consent and of our own choice, made a wakf of the abovementioned house in favour of ourselves and our family (ayal) and children (atfal). It is as follows: While we live, the abovementioned house shall remain and will be in our possession; and our abode and living together with our families and children shall be in the same, and we shall never sell the abovementioned house, nor shall we mortgage it; and whenever any of us shall depart from this world, his wife (zun) and children (furzand) that may survive shall remain in the house, and they shall not think of selling or mortgaging the said house. And out of the surviving persons, whether male or female, he who may be the eldest shall be a trustee of the said house.

Accordingly the trusteeship of the abovementioned house had been given to our mother Jijibái unanimously and with our consent. In like manner he who may be the eldest shall have the trusteeship of the abovementioned house; and it is necessary that the abovementioned house should be repaired every year. We have, therefore, willingly reserved three godowns which are situated on the ground floor of the said house, in order that having recovered the rents of the three godowns the same may be spent on the repairs of the said house; and taxes and ground-rent shall be paid out of the same, and they shall keep the abovementioned endowment house occupied and in good order. And in this manner our children and childrens' children (aulad dar aulad) shall keep the house in their possession, and shall in no way act otherwise in respect of the said house. And we, the four

persons, have made a *wakf* of the abovementioned house for ourselves and family (ayal) and children (atfal) and our heirs (warrasan) hereafter. We, or any of us, shall have no claim by way of ownership against this endowed house. Should any of us raise a claim against another in respect of the endowed house, the same shall be null and void and inadmissible. Therefore these few words have been written by way of a valid, legal, and trustworthy endowment paper."

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The above writing was signed by Jibibái and her three sons.

Jibibái died in 1824 leaving her three sons surviving her.

Muhammad died in 1830 leaving two daughters, Hudbái and Khatizábái, of whom Khatizábái died without issue. The plaintiffs were the surviving sons and daughter of Hudbái.

Ahmed died in 1827 leaving a son Rahimtulá.

Rahimtulá and his two sons, Hussen Miyá and Fattey Muhammad, were by the plaint alleged to be in possession of the house mentioned in the endowment writing, and were, with Jamnábái, the daughter of Abdullá, the original defendants to the suit. Rahimtulá died during the progress of the suit, and his daughters and widow in addition to his said two sons were made defendants as his representatives.

Abdullá died in 1846 leaving a daughter Jamnábái who, as above stated, was made a defendant in the suit, but was not in possession of any portion of the house.

On the death of Muhammad in 1830, Abdullá, the third son, took up the management of the house ; but, in consequence of a quarrel between him and Rahimtulá, Abdullá left the house about 1835. He took the endowment paper with him and, shortly before his death, gave it to his daughter Jamnábái.

Hudbái, the mother of the plaintiffs, left the house about the same time, and the plaintiffs never afterwards lived in the house.

The parties to the suit were of the Hullai Memon sect.

The important issues raised were—

2 H C

1873. 1. Whether the Persian writing was executed by Jijibái and her three sons ;
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RAHIMTULA'. 2. Whether the writing was valid according to law ;
3. Whether the persons executing the writing had power to make the disposition of the property therein comprised ;
4. Whether the suit was barred by the provisions of Act XIV. of 1859.

The evidence in the suit was taken before BAYLEY, J., who considered it desirable that the questions involved should be argued before two Judges. The case accordingly came on for argument before BAYLEY and MELVILL, JJ., on the 20th of January 1873.

Mayhew and Marriott for the plaintiffs.

The Honourable *A. R. Scoble* and *Latham* for the defendants other than Jamnábái.

Anstey and *B. Tyebji* for the defendant, Jamnábái.

Cur. adv. vult.

MELVILL, J.—It is certain that the settlement made by the ancestors of the parties, to which the plaintiffs and the defendant Jamnábái ask the Court to give effect, is one which would be invalid under English law. It creates a perpetuity of the worst description, for it prevents the alienation of the house for ever, and necessitates its use in a manner which the natural increase in the number of descendants would probably render impossible, even if they should be willing (which could hardly be expected) to live amicably under one roof throughout all generations. The absurdity of the settlement is sufficiently shown by the circumstance that, even during the lifetime of the executing parties, family quarrels arose which rendered it impossible for them to continue to live together.

If the parties to the present suit were Hindus, there would be little difficulty in deciding it. The Supreme Court of Bombay in a case (of *Maccundass Valubdass v. Ganputrao Gopinath and others*) reported in Perry's Oriental Cases

(p. 143), refused to give effect to a will restricting for ever the alienation of a family house; and the current of judicial decisions has always been unfavorable to attempts by Hindus to create perpetuities. Any doubt which might have existed on the subject has been removed by legislation, the provisions of Sec. 101 of the Indian Succession Act having been made applicable to the wills of Hindus in the Presidency Towns by Act XXI. of 1870.

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The Legislature declined to make the provisions of that Act applicable to the wills of Muhammadans, avowedly on the ground that the Muhammadans possess an elaborate legal system of their own upon the subject of wills, which is so closely connected with all their customs and with their religious belief that it would be improper to disturb it.* There are not, so far as we are aware, any reported decisions on the point in suits which have arisen between Muhammadans. The question, therefore, of the right of a Muhammadan to create a perpetuity is one which is untouched by either legislative or judicial authority.

The same general principle, however, which in other countries and other systems of law has led to the discouragement of perpetuities, as being equally opposed to public policy and to the interests of private persons, is as applicable to Muhammadans as to people of other races and creeds. The spirit of Muhammadan law would seem to be strongly opposed to an unlimited power to dispose of property; for, under it conditional gifts are invalid, while legacies cannot exceed one-third of the testator's estate, and a will made in favor of one son, or of one heir, cannot take effect to the prejudice and without the consent of the other sons or the other heirs. It was almost admitted in the argument before us, and we think that it must be admitted, that if the disposition of property, which we are considering, be regarded as a mere family settlement, it cannot be enforced; and that the

* See Speech of the Honourable Mr. Stephen in Legislative Council 1st January 1870.

1873. only ground on which effect can be given to it, is that it falls within the peculiar provisions of Muhammadan law relating to what is called "wakf."

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Now, there is perhaps no question of Muhammadan law in regard to which it is more difficult to find materials for a sound judgment than that of *wakf* or appropriations. As to the meaning of the term, and as to the constitution and effect of the theory which it describes, Hanifa and the two disciples appear to be in almost every particular hopelessly at variance; and in attempting to grasp at some intelligible principle on which to base a preference for the opinion of one over another, one is met by verbal subtleties and artificial distinctions from which one labors in vain to extract any definite meaning. After the best consideration which we have been able to give to the matter, we think that the correct legal meaning of the term "wakf," which originally means nothing more than "detention," is an appropriation of a pious or charitable nature. This is the definition given by Mr. Hamilton in his translation of the Hedaya (Vol. II, p. 334, note) and he is followed by Sir. W. Macnaughten. Professor Johnson, in his Persian and Arabic Dictionary, defines it as a "bequeathing for pious uses (as habitations for the poor and books for the use of learned men)." So Professor Wilson in his Glossary of Indian Terms: "*Wakf*—a bequest for religious or charitable purposes, an endowment, an appropriation of property by will or by gift to the service of God in such a way that it may be beneficial to men, the donor or testator having the power of designating the persons to be so benefited." It is true that Mr. Baillie, in his Digest of Muhammadan law (p. 549 note), expresses an opinion that the term is more comprehensive and includes settlements on a person's self and children. This opinion seems to be founded on the opinion of Abou Yoosaf, but is opposed to that of the other disciple, Mahomed, and other doctors of the law (2 Hedaya 349); and it would seem to derive its chief support from a saying attributed to the Prophet "a man giving subsistence

to himself giveth alms." This saying, if it stood unexplained, would be as little consistent with our sense of what constitutes a meritorious action as the selfish interpretation sometimes given to our own common saying that "charity begins at home"; but the Prophet's meaning is probably correctly explained by Mr. Hamilton (2 Hedaya 351, note): "As where (for instance) a man appropriates *the whole* of his property, thus reducing himself to poverty; in which case the charity is as effectual with respect to *him* (where he necessarily reserves a sufficiency from the product for his own subsistence) as with respect to *any other pauper*." And even Aboo Yoosaf, liberal and even radical as he is in his desire to bring family settlements within the category of lawful appropriations, does not venture to exclude the idea of charity altogether. For, though he differs from Aboo Huneefa and Mahomed as to the necessity of mentioning in express terms that the ultimate destination of the produce of the endowment is the support of the poor, he still admits that it must revert to the poor, as that must be supposed to be the appropriator's design, though he should fail to mention it (Baillie pp. 557, 558).

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We think that the balance of authority is strongly in favour of the conclusion that, to constitute a valid *wakf*, there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes. This view is in accordance with that taken by the Calcutta High Court in *Bibee Kuneez Fatima v. Bibee Saheba Jan and others* (a). It also derives support from the decision of the Judicial Committee of the Privy Council in *Jewun Doss Sahoo v. Shah Kubeer-ood-deen* (b). In that case, it was held that, according to the Muhammadan law, it is not necessary, in order to constitute a *wakf*, "or endowment to religious and charitable uses," that the term *wakf* be used in the grant, if from the general nature of the grant such tenure can be inferred. We think that the converse of this proposition holds good, namely, that it is necessary, in order to

(a) 8 Calc. W. Rep. Civ. R. 313.

(b) 2 Moo. Ind. App. 390.

1873. constitute a *wakf*, that the endowment should be to religious
 ABDUL GANNE and charitable uses, and that it is not sufficient that the mere
 KA'SAM term *wakf* should be used in the grant. To hold otherwise
 v, would be to enable every person by a mere verbal fiction to
 HUSSEN MIYA' create a perpetuity of any description.
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Now in the document with which we are dealing there is not, as it appears to us, the faintest indication, beyond the use of the word "*wakf*," that the persons making the settlement had any religious or charitable object in contemplation. We can see in it nothing but a spirit of family pride endeavouring to keep up a family house in perpetuity.

We are, therefore, inclined to hold that the settlement, which the plaintiffs ask us to enforce, cannot be maintained on the ground that it is a *wakf*.

It is not, however, necessary that we should come to a positive decision on this point, because there are other grounds on which we think that the plaintiffs must fail. Even if the settlement could be maintained as *wakf*, it is more than doubtful whether the plaintiffs, as the sons of a daughter of one of the appropriators, could take under its provisions. They are certainly not included as beneficiaries under the terms "*ayál*" (family) or "*atfál*" (children). It is equally certain that they do not come within the term "*furzundán*," or its Arabic equivalent "*awlád*" (see Wilson's Glossary under "*furzand*"; Baillie p. 570 and note, p. 571 note; Macnaughten's Principles pp. 331 to 333). They are not "*warrasan*" or heirs, being only the first of the distant kindred. There is only one expression in the whole document, viz., "*awlád dar awlád*," under which they might possibly come in on the authority of Baillie p. 572. But the words there used are more comprehensive. Looking to the limited signification of the word "*awlád*," it would be difficult to hold that the mere reduplication of the word could have the effect of letting in an entirely new class of beneficiaries. It would be necessary that the words should be very clear and explicit, before they could be held to ad-

mit the descendants of females, who had married out of the family, since the admission of persons who would be comparatively strangers to the family, would apparently frustrate the whole object of the endowment.

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On this ground, therefore, we are of opinion that the plaintiffs have failed to make out a case entitling them to any benefit from the settlement, even if the settlement could be held to be valid, which, in our opinion, it would be very difficult to hold.

Are they then entitled to succeed on any other ground? It must be regarded as a case of intestacy, and the plaintiffs, as the first of the distant kindred, would be entitled, under ordinary circumstances, to a share of the inheritance. But they are met by the plea of the law of limitation, and it appears to us that the plea is a good one. Undoubtedly, if the original defendant, Rahimtulá, was a trustee under the settlement, he could not plead the statute. But can he be considered to have been in possession at any time as a trustee? We think not. He was the son of Ahmed, the second of the three brothers who were the appropriators. By the terms of the settlement, the eldest surviving member of the family for the time being, whether male or female, was constituted the trustee. Accordingly, on the death of the mother, Jijibái, the eldest son, Muhammad, became trustee. On his death, he was succeeded by the third son Abdullá; Rahimtula's father, Ahmed, having intermediately deceased. Now, there can be no doubt on the evidence that, in consequence of a quarrel with Rahimtulá, Abdullá left the house about the year 1835, and was followed by the plaintiff's father and mother. Abdullá went to reside in another house, in which, according to some of the witnesses, he died. Jamnábái and the plaintiff's father say that he returned to the family house and died there; but the other story seems the more probable. It is certain that the instrument creating the trust has always been in Jamnábái's possession, having been given to her, as she says, by her

1873. father, Abdullá, two months before his death. This seems
 ABDUL GANNE to indicate that he regarded her, and not Rahimtulá, as his
 KA'SAM successor. There is nothing in the evidence to show whe-
 2. ther she or Rahimtulá is the elder. If she be so, then
 HUSSEN MIYA' under the terms of the settlement she would succeed to the
 RAHIMTULA' trusteeship as a matter of right.

The matter then stands thus :—Rahimtulá has been in undisturbed possession of the house, to the exclusion of all other members of the family, for more than 30 years. His possession certainly was not, in its inception, the possession of a trustee, for another trustee was living, and there is nothing whatever to show that at any subsequent period it necessarily assumed that character, nor that he ever admitted himself to be a trustee, nor that, until a few months before the institution of the suit, he received any notice from the other members of the family that he was held to be a trustee. Under these circumstances, we must hold that his possession was adverse, and that any claim which the plaintiffs or Jamnábái may have by virtue of inheritance is barred by lapse of time.

We find on the first issue in the affirmative. We find the 4th, 7th, and 8th issues in favour of the defendants other than Jamnábái. On the 9th issue we find in the negative. On the 2nd, 3rd, 5th, and 6th issues it is unnecessary to record any finding.

We pass a decree in favour of the defendants other than Jamnábái.

Jamnábái will pay her own costs. The plaintiffs will bear the costs of the other defendants.

[APPELLATE CIVIL JURISDICTION.]

*Regular Appeal No. 26 of 1871.*1873.
January 28.SHRIDHAR HARI *Appellant.*CHIMA' valad LA'DU and BA'PUJI }
AMRUT MA'MLATDA'R of PARNER } *Respondents.**Procedure—Improper Joinder of Government officer as defendant—Rejection of plaint—Return of plaint for presentation to proper Court.*

Where a plaint is presented to the Judge of a district, in which plaint an officer of Government is added as a nominal defendant, no cause of action being alleged against him, the proper course for the District Court to adopt, is either to reject the plaint, or to call upon the plaintiff to amend it by striking out the name of the officer improperly added as a defendant, and, upon the plaintiff consenting to do so, to return the plaint to the plaintiff for presentation to the court of the lowest grade competent to try it.

Where the District Judge did not adopt this course, but proceeded to try the cause, the High Court annulled his decree, and (the plaintiff consenting to amend his plaint) returned it to him for amendment and presentation to the proper court.

THIS was an appeal from the decision of A. Bosanquet, Judge of the District of Ahmadnagar, rejecting the plaintiff's claim.

The plaintiff in his plaint alleged that the proprietor of certain lands, situated in Taluka Parner, redeemed them from his mortgagees, of whom the defendant No. 1, Chimá valad Ládu, was one, and mortgaged them to the plaintiff, placing him in possession on the 23rd of June 1860; that in a summary suit brought by the defendant, Chimá, in the court of the Mámlatdár, the second defendant, the latter, by an order dated the 9th of July 1868, deprived him of his possession. The plaintiff prayed that a decree should be passed against both the defendants, and that his possession should be restored to him.

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The defendant, Chimá, stated that he had the right of possession in consequence of his mortgage from the proprietor, which was, as he alleged, still unredeemed. The Mámlatdár pleaded that he had full authority to dispose of the complaint of the first defendant under Bombay Act V. of 1864, and that as he had acted *bonâ fide*, he was protected by Act XVIII. of 1850.

The District Judge, holding the decree of the Mámlatdár's court conclusive on the question of possession, and being of opinion on the evidence that the plaintiff had not proved his claim, gave a decree in favor of the defendants.

The appeal was heard by SARGENT, Acting C.J., and MELVILL, J.

Bahiravnáth Mangesh for the appellant.

Chunilál Mániklál for the respondents.

PER CURIAM:—The plaint does not allege a cause of action against the Mámlatdár, nor seek any relief against him. The plaint should, therefore, have been rejected by the Judge unless the plaintiff consented to amend it by striking out the name of the Mámlatdár; in which case he would have had no jurisdiction to try the suit. This Court annuls the decree, and the plaintiff, by his Vakil, consenting to amend the plaint by striking out the name of the Mámlatdár, returns it to him to be presented in the proper court. It is clear that the Mámlatdár is only a nominal defendant, and that his being made so was solely for the purpose of evading the law.

Decree annulled.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 374 of 1872.*1873.
March 3.

BA'PU bin IshVAR *Appellant.*
 LAKSHUMAN BA'JI..... *Respondent.*

Limitation—Suit to set aside order—Date of order—Signing of order
—Civ. Proc. Code, Secs. 185 and 246—Act XXIII. of 1861, Section 33

In computing the time for bringing a suit to set aside an order made under Section 246 of the Code of Civil Procedure, the date upon which the order is signed, and not the date upon which it is verbally made, should be considered.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Satara, in a regular appeal, affirming the decree of the Subordinate Judge of Vittey.

The suit was brought to recover possession of a house. The defendant, Lakshuman, under a decree in his favour against Bandu, attached the house in execution. Bápu then applied, under Section 246 of the Civil Procedure Code, to raise the attachment on the ground that the house belonged to him, as he had purchased it from Bandu before the attachment. That application was rejected, and Bápu was referred to a regular suit. The order of rejection was orally given on the 1st August 1864, but was not signed by the Subordinate Judge till the 30th of that month. The plaint in the present suit was filed on the 28th August 1865.

The defendant, Lakshuman, *inter alia* pleaded that the claim was barred under Section 247 of the Code of Civil Procedure.

Both of the Lower Courts decreed in favour of the plaintiff. The District Judge said—

“ Issue (1) Is this claim barred ?

* * * * *

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"This claim was filed 28th August 1865, and under Section 246 of the Civil Procedure Code, any claim by a party against whom an order refusing to give up the property to him has been passed, must be made within a year from the date of the order; the 'order' here is dated 1st August 1864, but the date of its being *signed* is 30th August. Now, it seems to be plain that the order was *not* an 'order' till it was signed as such, and that if, from any cause, there was a difference of time between the actual drafting of the order and the signing of it, the latter date is to be held as the 'date of the order.' The Court's Sheristedár has given a deposition about this, and has stated that the Subordinate Judge gave the order verbally on the date when it was written out; but from an oversight the signature was not made on the order till 30th August. It is *said* that the order was pronounced on the 1st August, though the delay in signing took place as above. But by the words of Section 247 'the date of the order,' I can only consider the 'order' to be an 'order' when it is signed and not before; and I do not think that the *verbal* explanation given will set aside the *written* date of the signature, and must hold that an order signed 30th August must be considered to be one of this date, and that as this claim was made within one year after this date, *i.e.*, 28th August 1865, it is not barred, and on this ground I must on the first issue hold this claim to be within limit."

The special appeal was argued before WESTROFF, C.J., and MELVILL, J.

Mánikshá Jahángirshá for the appellant.

Ghanashám Nilkant for the respondent.

PER CURIAM:—Having regard to Section 185 of the Civil Procedure Code and Section 38 of Act XXIII. of 1861, this Court is of opinion that the order made under Section 246 of the Civil Procedure Code was not complete until it was signed upon the 30th August 1864, and therefore this Court affirms the decree of the District Judge with costs.

Decree affirmed with costs.

2d Bom. H. C. Rep. 321.
ILR 4 Bom. H. C. 321.

[APPELLATE CIVIL JURISDICTION.]

Referred Case.

1873.
 March 4.

RATANSHANKAR REVA'SHANKARPlaintiff.
 GULA'BSHANKAR LA'LSHANKARDefendant.

*Small Cause Court—Jurisdiction—Implied contract—Varshāsan—
 Claim to recover share in Varshāsan received by Defendant—Act XI. of
 1865, Sec. 6.*

Suit to recover a share in a *varshāsan* payable by the Gaekwad's Government and received by the defendant as the eldest member of the original grantee's family, is cognizable by a Court of Small Causes in the Mofussil, the claim being one on an implied contract, viz., a contract, by the defendant, to pay to the plaintiff money received by the defendant to the use of the plaintiff.

Sunkur Lall Pattuck Gyawal v. Mussamut Rām Kalee (18 Calc. W. Rep. Civ. R. 104) followed.

Keshav Bhat v. Bhāgīrthi Bāi (3 Bom. H. C. Rep. A. C. J. 75) overruled.

THIS case was referred to the High Court by Syud Hussein El Medini, Judge of the Small Cause Court at Surat, with the following observations :—

“The plaintiff brings this action to recover the above sum to which, he alleges, he is entitled as a sixth sharer in a *varshāsan* originally granted by the Gaekwad to their ancestor, which the defendant, being now the eldest member of the family, draws from the Nowsaree Treasury and distributes among the several sharers.

“The plaintiff had before filed a suit in the Munsif's Court at Surat to recover the money which then had accrued due. The Munsif gave a decree in his favour, but the then Judge of Surat reversed the decree on the ground ‘that the action was virtually to try the right to the *hak* in question, a right which a foreign court is not competent to adjudicate on.’ The High Court, however, in Special Appeal No. 539 of 1867, set aside this ruling and remanded the case to the Judge who then confirmed the decree of the Munsif.

1873. "The present action is to recover the plaintiff's share of the money which the defendant has since received from the Gaekwad's Treasury."

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The Judge then referred to *Keshav Bhat & Bhágirthi Báí* (a), a suit brought by a widow to recover a sum of money which she claimed as her share in a *varshásan*, or annual allowance, paid from the Government Treasury to the defendant, which suit the High Court (TUCKER and GIBBS, JJ.) held to be not cognizable by a Court of Small Causes, TUCKER, J., there saying :—"It does not appear to us that the words used by the Legislature in Section 6, Act XI. of 1865, which define the jurisdiction of Courts of Small Causes, include a claim of this description. It has been argued that the debt, if due at all, is due on account of an implied contract between the parties; but this proposition, we think, cannot be maintained, as the plaintiff's alleged right to share in the allowance is not founded upon any contract, express or implied."

On the other hand, the Judge referred to the judgment of the High Court (COUCH, C.J., and NEWTON, J.) delivered by COUCH, C.J., on 20th November 1867, in the special appeal case between the parties to this plaint referred to above, in which it was said :—

"The question to be determined was whether money, which had been received by the defendant, had been received partly on the plaintiff's account; there was jurisdiction to try this, and if it became necessary incidentally to try the question of title to the money, it would not deprive the Court of jurisdiction. The Judge was wrong in holding that the Munsif had no jurisdiction, and as this is a question of jurisdiction, the Court thinks, although no special appeal lies, it should exercise its extraordinary powers and correct the error." The Judge also mentioned *Ramchandra Dixit v. Sávitribai* (b).

(a) 3 Bom. H. C. R. 75, A. C. J.

(b) 4 Bom. H. C. R. 73, A. C. J.

He next cited *Sunkur v. Mussamut (c)*, in which COUCH, C.J., said:—"We are of opinion that a special appeal does not lie in this case. Section 27, Act XXIII. of 1861, provides that a special appeal shall not lie in a suit of the nature cognizable in the Courts of Small Causes under Act XLII. of 1860, when the debt, damage, or demand, for which the original suit was instituted, does not exceed Rs. 500. The suits which are cognizable by Courts of Small Causes are now defined by Section 6 of Act. XI. of 1865, to which, by Section 50, the Act XXIII. of 1861 is made applicable, and amongst them are claims for money due on bond or other contract. The claim in this suit is to recover money which, the plaintiff says, the defendant has received, and which the plaintiff is entitled to a share of. In fact, *the claim is founded upon this, that the defendant, with regard to a portion of the money which belonged to the plaintiff, received it for and on behalf of the plaintiff, and the right to recover it is founded upon what has always been regarded as an implied contract to pay it over to the person for whom it was received.* We think the word 'contract' in Section 6 was intended to include such cases. That it was, is apparent from the exceptions in the proviso to the section, one of which is an action on a balance of partnership account, unless the balance shall have been struck by the parties or their agents. A right to recover a balance of a partnership account by one partner against another is founded upon one partner acting as agent to the others, and receiving money as such agent and being bound to pay the others their shares. If the words of Section 6 are large enough to include a claim of the kind, certainly they would include such a claim as the present. Again, it seems to have been supposed that, if it had not been otherwise provided, there would have been a right to recover a share or part of a share under an intestacy; which must be on the ground that the party, who had the share,

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1873. was under an implied contract to pay it over. These instances shew that "contract" in Section 6 was intended to have a very extensive meaning, for there are no other words in the section which would include such cases. They would not come within the term damages. It has been held by this Court, in a case which is reported in the special (Small Cause Court) number of the Weekly Reporter, page 23, and is quoted in Mr. Broughton's note to Section 6, that a Small Cause Court has jurisdiction in a suit brought by one of several joint owners of property against his co-sharer for his share of the profits."

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SHANKAR
REVA'-
SHANKAR
v.
GULA'B-
SHANKAR.
LA'L SHANKAR

The Judge, finding the authorities in conflict, referred to the High Court the question whether the plaint in the present case was cognizable by the Small Cause Court, and he expressed his own opinion to be in favour of the affirmation.

The reference was considered by WESTROPP, C.J., and MELVILL, J., on the 3rd March 1873. The following judgment was given on the 4th March by—

WESTROPP, C.J.—The question for determination here is whether the plaintiff, who is entitled to a $\frac{1}{4}$ share in a *varshdāsan* payable by the Gaekwad's Government, and which has been received by the defendant, who is the eldest member of the family of the original grantee, may sue in the Court of Small Causes at Surat for that share. It is money received by the defendant to the use of the plaintiff—a state of circumstances involving an obligation, which has hitherto been known to English lawyers as amounting to an implied contract on the part of the recipient to pay over the money so received to the person on whose behalf it was received.

We concur in the decision of Couch, C.J., and Ainslie, J., in *Sunker Lall Pattuck Gyawal v. Mussamut Ram Kalee Dhamin (d)*, and in the reasons given for it, viz., that two of the specially excepted cases of contracts mentioned in Section 6 of Act XI. of 1865 show that the Legislature
(d) 18 Calc. W. Rep. 401.

intended under the words "other contract" contained in the first part of that section, defining the suits cognizable by Courts of Small Causes, to include implied contracts, and, consequently, that moneys due on implied contracts, not falling within the exceptions, are recoverable by suits in the Small Cause Court. In *Dullabh Shivlall v. Hope* (e), the Court yielded to the objection that no special appeal would lie in the suit there brought, it being of the nature cognizable by a Court of Small Causes. It was for money, which the plaintiff had been wrongfully compelled to pay in respect of Municipal Taxes to the Municipality of Surat, and which he sought to recover from it, as received by the Municipality to his use, i.e., due upon an implied contract. That decision proceeded on the same principle as that of Couch, C.J., and Ainslie J. in the Bengal case already mentioned. We are unable to concur in the decision in *Kesharbhat v. Bhdgirathi Bai* (f)

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SHANKAR
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The decision in *Charookhan v. Doorga Monee* (g), notwithstanding what is said in the brief judgment as there reported, that the suit was substantially one for a breach of contract for the sale of land, would, in our opinion, have been more properly based upon the ground that the purchase money was recoverable on an implied promise to repay it, the consideration for it having failed. See Chitty on Contracts 561 (7th Edition).

We do not think that the jurisdiction of Small Cause Courts is in anywise affected by the Indian Contract Act (IX.) of 1872.

We concur with the Judge of the Court of Small Causes in thinking that the plaint in this cause was cognizable in his Court.

(e) 8 Bom. H. C. Rep. A. C. J. 213.

(f) 3 Bom. H. C. Rep. A. C. J. 75.

(g) 9 Calc. W. Rep. Civ. R. 498.

1873.
March 6.

[ORIGINAL CIVIL JURISDICTION.]

Appeal Suit No. 203.

J.L.R. 8 Bom. 414 SA'HEB V. N. MANDLIKPlaintiff.

KAMALJA'BA'I SA'HEB NIMBA'LKAR, Mother and
Guardian of GOPA'LEA'V HANMANT NIMBA'LKAR
SAR LASKAR BAHADUR, a minor residing at
KolhapurDefendant.

Power of Attorney—Attorney's authority to enter into special agreement with a Vakil—Vakil—Special agreement as to reward proportional to amount recovered—Public policy.

The defendant, on behalf of her minor son, gave to S. M. a power of attorney by which she authorized S. M. "for her and in her name and on her behalf to appear in or sue or defend * * * any suit, appeal, or special appeal,* * * and to act in all such proceedings in any way in which she might, if present, be permitted or called on to act."

Held that the above power did not authorize S. M. to enter into a special agreement with a *Vakil*, under which the *Vakil* (in an appeal which he was employed to conduct for the defendant on behalf of her minor son) was to receive for his services a *minimum* reward of Rs.4,000, and, in case of success, a reward proportional to the amount awarded by the Appellate Court.

Whether such a special agreement as the above is one that the Court would enforce—*Quære*.

THIS was an appeal from the decree of GIBBS, J., made on the 15th of July 1872.

The suit was brought to recover the sum of Rs. 5,371-15-0 with interest at 9 per cent. per annum from the 6th of May 1869 until judgment. The plaintiff averred that the defendant, on the 18th of October 1867, by her agent Sadashiv Mahipat, executed, in favour of the plaintiff, a bond in the Maráthi language, and then set out the substance of the bond which is printed below.

It was then averred that the plaintiff acted as *vakil* in the special appeal mentioned in the bond on behalf of the minor son of the defendant, and that, on the 6th day of April 1869, the special appeal was allowed and the decree of the Lower Court reversed, and that the estate of the said minor, of which the defendant had charge, was thereby benefitted to the amount of Rs. 21,487-14-2.

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The plaintiff submitted that the defendant was liable to pay the moneys claimed by the plaintiff, and also that the estate of the minor in the hands of the defendant was chargeable with the payment of the moneys claimed.

The plaint also contained a count for work and labour done at the request of the defendant.

The Maráthi bond or agreement mentioned in the plaint was addressed to the plaintiff and ran thus :—

"I, Sadáshiv Mahipat Altekár, on behalf of the Sar Laskar, inhabitant of Kolhapur, at present residing at Bombay, * * * give in writing as follows :—Whereas Gopálráv H. Nimbálkar Sar Laskar Bahádúr, a minor, by his guardian, his mother Kamaljábái, has given to you a *vakil-patra* to make a special appeal against Govind Bhimji and others relating to the Sholapur Náyakship. Now, should the decision in respect of the said special appeal be in our favour, * * * we will pay you a reward of Rs. 4,000; and in case it should be directed that less than the Rs. 21,487-14½ adjudged by the Judge should be paid, then we will pay you as a reward a fourth of as many rupees as shall be awarded less. And should the Court, on the other hand, adjudge Govind Bhimji and others to pay us money, we will pay the whole of the said money to you in addition to the Rs. 4,000 * * *. We will pay the money within a month from the date of the decision"; dated 18th October 1867 and signed "Sadáshiv Mahipat on behalf of Gopálráv Nimbálkar Bahádúr Sar Laskar by his guardian Kamaljábái Sáheb Nimbálkar, my own handwriting."

The power of attorney, under which Sadáshiv Mahipat signed the above agreement, was in a form which was stated to be common in the Mofussil.

"HER MAJESTY THE QUEEN.

A GENERAL POWER OF ATTORNEY.

I Gopálráv Hanmant Nimbálkar Sar Laskar, a minor in age, therefore (represented by his) guardian (and) mother Kamaljábái of the town of Solahpur, by this writing, have chosen and appointed * * * my true

1873. and lawful attorney for me and in my name and on my behalf to appear
 RA'Y SA'HEB in, or sue, or defend, and to receive all papers and process in any suit
 V. N. MAND- appeal, special appeal, or other judicial proceedings whatsoever in any
 LIK court, and to act in all such proceedings in any way in which I might,
 v. if present, be permitted or called on to act."
 KAMALJA'RA'I.

The material issues raised at the trial were the second, fifth, and sixth.

II. Whether the defendant, by her agent or otherwise, executed or delivered to the plaintiff the bond as in the 2nd paragraph of the plaint alleged.

V. Whether the sum of Rs. 5,371-15-6, claimed in the plaint, is not an extravagant and unreasonable charge.

VI. Whether the contract in the second paragraph of the plaint set forth is not void on grounds of public policy.

The plaintiff was called. He proved that he had been employed by Sadáshiv Mahipat to prosecute the special appeal, and that it resulted in favour of the appellant. He said that he had seen similar agreements to the one he had entered into with Sadáshiv Mahipat, and that there was hardly a case in which such agreements were not made between *vakils* and their clients, for that otherwise *vakils* could not practise, their fees being so small. He said he had never seen Kamaljábai. *He also said that he was willing to take a decree against Kamaljábai personally, and the case proceeded on that footing. No other evidence was given.*

The learned Judge found the second issue in the affirmative for the plaintiff, and the fifth and sixth issues in the negative and for the plaintiff, and passed a decree in favour of the plaintiff with costs against the defendant personally.

The appeal was argued before SARGENT, Acting C.J., and MELVILL, J., on the 16th and 17th of January 1873.

Anstey and Latham (with them *Kássináth Telang*) for the appellant.—By the bond that is sued upon we contend that Kamaljábai intended to bind her son's estate not herself personally. Her signature, like that of a *tutor* in Roman Law, supplies the defect of age on the part of the minor. But

even assuming that she is personally bound by the terms of the bond or contract, we say that the power of attorney, which she signed, did not authorize Sadáshiv Mahipat to enter into, and bind her personally by, a special agreement of this nature: Story on Agency pl. 62 *et seq*; *Gardner v. Baillie* (a); *Howard v. Baileie* (b). A power of attorney must be construed strictly: *Attwood v. Munings* (c).

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The agreement is also, we contend, void for champerty or rather as being opposed to public policy: *Grose v. Amirtamayí* (d), *Stanley v. Jones* (e), *Reynell v. Sprye* (f), *Sprye v. Porter* (g), *Earle v. Hopwood* (h), *Grell v. Levy* (i). To enforce an agreement of this kind would be a dangerous precedent to establish for *vakils* practising in the Mofussil.

Marriott and Macpherson for the respondent.—The guardian of an infant is primarily liable for the costs of a suit instituted for the benefit of the infant: *Marnell v. Pickmore* (j), *Hawkes v. Cottrell* (k), Chitty's Archbold's Practice 1243. There is no evidence to show that the agreement sued upon is unreasonable, and so the learned Judge has held, and it is shown, upon the evidence, that it is not an unusual agreement. That being so, Kamaljábai's attorney had power to enter into it on her behalf. If not, the plaintiff is entitled to recover on a *quantum meruit*. Section 7 of Act I of 1846, enables *vakils* legally to enter into special contracts for their remuneration.

Anstey in reply.

Cur. adv. vult.

SARGENT, J.:—The plaintiff in this suit seeks to recover from the defendant, Kamaljábai Sáheb Nimbálkar, the sum of Rs. 6,361-10-11 alleged to be due to him for services performed as her *vakil* on behalf of her infant son, Gopálráv Hanmant, in a certain special appeal heard and determined

(a) 6 Term Rep. 591. (b) 2 H. Bl. 618. (c) 7 B. & C. 278. (d) 4 Beng. L. Rep. O. C. 1. G. (e) 7 Bing. 369. (f) 1 De M. & G. 660. (g) 7 El. & B. 58. (h) 9 C. B. N. S. 566. (i) 16 C. B. N. S. 73. (j) 2 Esp. 473. (k) 27 L. J. Exch. 369.

1873. in this Court, under and by virtue of an agreement, dated
 RA'V SA'HEB the 18th October 1867, entered into between himself and
 V. N. MAND- one Sadáshiv Mahipat, acting as her agent. The plaint also
 LIK seeks to charge the estate of her infant son in her hands with
 v. the payment of the said sum.
 KAMALJA'BA'I.

At the hearing, an objection was taken that the minor ought to have been made a party to the suit, in order to charge his estate, and it was ultimately arranged that the claim should be treated exclusively as one against the defendant Kamaljbái in her individual capacity.

The defendant, by her written statement, pleads that the agreement was executed by Sadáshiv without any authority from her authorizing him in that behalf. At the hearing, however, the claim was further disputed as being an extravagant and unreasonable charge and also as being void on the ground of public policy; and appropriate issues were framed to raise those questions.

The Court below, having decided both these issues in favour of the plaintiff, proceeded to say :—"I can see no objection of a decree being given against the defendant personally. She alleges she is guardian of her infant son, a resident beyond the British territory. She has been allowed to appear in that capacity in the Courts, but whether in this case she acted for his benefit or no is not a question for me to decide so as to bind the estate. All I am asked to do is to decree against her for a sum which her own constituted attorney engaged to pay in her behalf, and I do not see any objection to my doing so."

It is not necessary for us to express any opinion on the issues as to the extravagance of the claim or the illegality of the agreement, as we find ourselves unable to agree with the learned Judge that Sadáshiv executed the bond in question, being duly authorized in that behalf.

The employment of the plaintiff as *vakil* arose out of the following circumstances :—

A suit had been filed by the defendant on behalf of her infant son to recover possession of 19 fields situated at Sholapur, in which an adverse decree had been passed by the Munsif, which was afterwards confirmed by the District Judge of Dharwar. In 1865, a special appeal was presented to the High Court, which resulted in the case being remanded for certain accounts to be taken, and the decree on the remand not being favourable to the plaintiff, a second special appeal was presented to this Court in 1867. On this occasion, a *vakilat namá* was granted to the plaintiff by one Sadáshiv Mahipat as general attorney for the plaintiff, guardian of her infant son, and on the same day the bond in question was executed by Sadáshiv. (His Lordship read the bond.)

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Now, it can scarcely be doubted, we think, looking at the whole of this instrument that the particular object of it is to enable the attorney to represent the party to the suit in all judicial proceedings to the same extent as the party himself, if present, might be permitted or called upon to do. Authority is given, it is true, to "sue and defend," but those words must, as Mr. Justice Story says in his work on Agency, Sec. 62, be construed in subordination to the particular subject matter in connexion with which they are used. Here, from the position which they occupy, they plainly denote the two-fold character of plaintiff or defendant in which the attorney may be called upon to appear and act "in any suit appeal, special appeal, or other judicial proceeding whatsoever in any Court," and whatever acts might otherwise be properly included in the expressions "sue and defend," if they stood alone, they are here, we think, clearly confined to acts done in the above proceedings.

This view derives corroboration from the circumstance that the power is identical in form with the general power promulgated in the Circulars of this Court in its Appellate jurisdiction for constituting a recognized agent as contemplated by Secs. 16 and 17 of the Code of Civil Procedure, *i.e.*, for the purpose of making all applications to and appearances in any Civil Court. This form of power of attorney is

1873. in general use throughout the Mofussil, and even on this
 RA'V SA'HEB ground it would be difficult to hold that it was the intention
 V. N. MAND- of the defendant to give Sadashiv greater powers than those
 LIK contemplated by the above sections, or that the plaintiff, who
 v. was perfectly familiar with the form of power, could have
 KAMALJA'BA'I. supposed that such was her intention. These remarks are
 sufficient to dispose of the case. Assuming, however, that
 the words "sue and defend" should, as was contended for the
 plaintiff, be read apart from the context which limits them,
 as we think, to acts done in judicial proceedings, we should
 equally find it impossible to construe them as authorizing
 the execution of the bond in question. It was said that a
 power to sue would authorize the appointment of a *vakil*,
 and that as special arrangements with *vakils* for the remuneration
 of their services are allowed by law and are of every day
 occurrence, and that the bond was, therefore, within the
 power as one of the usual and appropriate means for accomplishing
 the object of the agency. But the general rule, which allows of the
 agent resorting to all usual means for carrying out his agency,
 has always received a restricted application in construing formal
 and deliberate instruments of this sort as distinguished from
 ordinary documents conveying instructions and letters of advice
 which are of such constant use in commercial matters. Mr. Justice
 Story, in Sec. 68 in his treatise on Agency, says, formal instruments
 of this sort are ordinarily subjected to a strict interpretation, and
 the authority is never extended beyond that, which is given in terms,
 or which is necessary and proper for carrying the authority so given
 into full effect; and the English cases cited by him (which, however,
 we do not think it necessary to refer to more particularly, as they all
 turn upon their own special circumstances) undoubtedly establish that
 principle of construction.

Now, the bond in question provides for the case of the decision on the special appeal being in favour of the appellant, in which case it is agreed that the plaintiff is to have a reward of Rs. 4,000; 2ndly,—in case a less sum should be directed to

be paid by the appellant than that fixed by the decree of the Court below, then that the plaintiff should be paid one fourth of the difference; and lastly, if any money should be ordered to be paid to the appellant by the respondent, then that such sum should be paid to the plaintiff in addition to the Rs. 4,000. It will scarcely be denied that this agreement is of a most special character. It was, indeed, stated by the plaintiff in his evidence that agreements similar to the above are frequently entered into between *vakils* and their clients—agreements by which *vakils* are, over and above the ordinary remuneration for their services, rewarded, in case of success, with a sum out of all measure with what they would be otherwise entitled to by law and depending upon the fruits of victory; but, whether that be so or not, we think it impossible that such an agreement, if indeed any special agreement contemplated by Act I. of 1846, can be deemed to be necessary and proper for carrying out a simple authority to “sue and defend.” In the present case there is the additional circumstance that the authority was given by a person in a representative character and for and on behalf of the estate of a minor.

1873.
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BA'I.

This circumstance would alone confine the authority to such ordinary acts as were obviously necessary for its execution, as it could not reasonably be presumed that the guardian intended to empower the agent to bind her personally (as indeed would be the legal effect of the agreement) by any arrangement, however onerous, which he might think proper to enter into with her *vakil*.

At the hearing, indeed, we were asked to allow the plaintiff to be examined as to acts of corroboration by the defendant. Such a course would, however, be entirely opposed to the practice of this Court. It would be to allow the plaintiff to set up a case which was not alleged in his plaint, as to which no issue was framed, and which is not supported by any evidence on the record.

1873. For these reasons, we are unable to agree with the Court below that Sadāshiv had an authority to bind the defendant or the estate of the infant by the bond in question.

RA'V SA'HEB
V. N. MAND-
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KAMALJA'BA'I.

The appeal must, therefore, be allowed, and judgment passed for the defendant with costs in the Court below. Parties to pay their own costs of appeal.

Attorney for the plaintiff—*Venayekrao Harichand.*

Attorney for the defendant—*D. S. Garud.*

Note—See the concluding portion of the judgment in *Vinayak Raghunath v. G. I. P. Railway Co.*, at page 118, 7 Bom. H. C. R., where the Court declined to recognise an agreement somewhat similar to that in the above case.

[APPELLATE CIVIL JURISDICTION.]

1872.
March 19. *Regular Appeals Nos. 1 and 2 of 1871 under the Land Acquisition Act X. of 1870.*

No. 1.

A. D. CAREY, ASSISTANT to the COLLECTOR

OF SURAT *Appellant.*
BANU MIYA' and another *Respondents.*

No. 2.

A. D. CAREY, ASSISTANT to the COLLECTOR

OF SURAT *Appellant.*
KA'LU MIYA' and another *Respondents.*

Market Value—Land Acquisition Act X. of 1870—Valuation of Land—Annual Rental.

In assessing the market value of house property, situated in the town of Bulsar, acquired for public purposes under Act X. of 1870, the court awarded a capital sum which, at the rate of six per cent. per annum, would yield interest equal to the ascertained annual rental of the premises after deducting the amount necessarily expended for annual repairs.

THESE were appeals against the decisions of W. H. Newn-
ham, Judge of the District of Surat, in cases referred to
him under Section 15 of the Land Acquisition Act, 1870.

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v.
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MIYA'.

They were heard by MELVILL and KEMBALL, JJ.

Dhirajlál Mathurádás (Government Pleader) for the ap-
pellent.

V. N. Mandlik for the respondents.

The facts of the case, in so far as they are material, appear
in the judgment of the Court.

MELVILL, J. :—These cases have been brought before us,
apparently, in order that we may lay down some general prin-
ciple on which compensation should be calculated in such cases.

As the shops, which have been pulled down, were occu-
pied, not by the owners, but by mortgagees, the only one of
the four matters, mentioned in Sec. 24 of Act X. of 1870,
which has to be considered in these cases, is the market value
of the property. The District Judge considers that the as-
certained rental should represent 6 per cent. on the market
value of the shops. To this it is objected that the Judge
should have taken into account the necessary expenditure
from the rent on account of repairs.

We think that there is weight in this objection. Consider-
ing the rate of interest ordinarily obtained in the Mofussil, we
consider that a person, investing in house property, would
have a right to expect that the rent should represent a net
return of 6 per cent. after deducting all expenses on account
of repairs. Against this nominal profit he would have to set
the cost of insurance and house taxes, the risk of the house
being temporarily untenanted, and other contingencies vary-
ing according to circumstances.

The only evidence as to the expense of repairs is that of
the witness Utamráam, who has been called by both parties
and was considered by the District Judge to be the most
reliable witness in the case. He says: "Repairs to house
property might amount to about a quarter of the rent in Bul-
sar." This is very vague testimony; for it is clear that ex-

1872. penditure on repairs must vary according to the original construction of a house, and the care subsequently bestowed upon it. But the defendant, by whom the objection has been raised, has produced no other evidence on the subject. The shops to which these cases relate are very old, and we shall certainly not be doing an injustice to the plaintiffs, if we adopt Utam-rám's statement, and take a quarter of the estimated rent for the amount which the owner would be obliged to expend in order to keep the shops in proper repair.

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MIYA'.

In case No. 1 the estimated rent is Rs. 100. Deducting one quarter for repairs, Rs. 75 would be the net annual proceeds, which sum represents at 6 per cent. a capital of Rs. 1,250. This added to Rs. 200 for the cattle shed is less than the sum offered by the Assistant Collector. We therefore amend the District Judge's decree in this case, and award to the plaintiff only the amount tendered, viz., Rs. 1,725. Of this sum, Rs. 1,495 to be paid to the mortgagee Dvárkádás, and the balance Rs. 230 to be divided equally between Zahir, Bannu, and Badu.

In the other case, the ascertained rent is Rs. 80. Deducting one quarter, we have Rs. 60 as the annual net proceeds, which sum represents at 6 per cent. a capital of Rs. 1,000. This was the sum offered by the Assistant Collector, but, for some unexplained reason, he made no offer for the cattle shed behind the shop, though there would appear to be as much reason for doing so in this as in the other case. The value of the cattle shed is estimated by the District Judge at Rs. 155. We award Rs. 1,155 and Rs. 173, under Sec. 42; altogether Rs. 1,328, to be paid to the mortgagee Mániklál.

Costs in Appeal No. 1 and in the original suit to be paid by the plaintiffs. Costs in the other case by the defendant.

Decree accordingly.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 12 of 1870.*1873.
March 24.DA'MODAR GORDHAN *Appellant.*GANESH DEVRA'M ET AL *Respondents.*

Jurisdiction—Cession of Territory—Power of Indian Governments to cede territory—Notification of Cession by Government of India—Indian Evidence Act (I. of 1872) Sec. 113.

The power to cede territory was not one of the powers to which the Secretary of State for India in Council succeeded under Act 21 & 22 Vic., c. 106, when the Government of India was, by that statute, transferred to Her Majesty, inasmuch as such a power was not possessed by the East India Company.

The Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace, as such a law must of necessity affect the authority of Parliament, and those unwritten laws and constitutions of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.

Section 113 of the Evidence Act (I. of 1872) therefore, though not disallowed, is not protected by Sec. 24 of Stat. 24 & 25 Vic., c. 67, and the direction therein contained, that a notification in the *Gazette of India*, that any portion of British territory has been ceded to any native State, Prince, or Ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification, cannot be followed,

THIS was a special appeal heard in review from the decision of C. B. Izon, Acting Judge of the District of Ahmedabad, confirming, on remand from the High Court, the decree of the Munsif of Gogo.

The facts of the case, in so far as they are material, sufficiently appear from the judgment of the Court.

The special appeal was heard by LLOYD and KEMBALL, JJ.

Marriott (with him *Dhirajlál Mathurádás*, Government Pleader) for the special appellant.

1873. *Anstey* (with him *Nánabhai Haridás*) for the special respondents.

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RA'M

Our. adv. vult.

KEMBALL, J. :—Before proceeding to discuss the important points raised, it will be well to sketch briefly the history of this case.

The action (Original Suit No. 380 of 1864) was brought in the Court of the Munsif of Gogo to redeem a field (situated in the village of Ghangli) which had been mortgaged in A.D. 1812 to one Gordhan. The defendant denied the mortgage and set up a sale; but the court decreed for the plaintiff. In appeal, however, the Assistant Judge of Ahmedabad reversed that decree, when a special appeal was preferred to the High Court, which remanded the case for retrial, because that the Lower Court had improperly excluded from its consideration an important document.

The regular appeal was then reheard by the District Judge himself who found the mortgage proved, and affirmed the Munsif's decree.

A second special appeal was thereupon preferred to the High Court, mainly on the ground that "the Judge had no jurisdiction to try the appeal, as the village in which the land is situated was removed from the jurisdiction of the Civil Courts long before the appeal was decided." This objection was based on a notification, dated the 29th January 1866, published in the *Bombay Government Gazette*, p. 197, and signed by the Chief Secretary to the Bombay Government, which signified that in accordance with a convention made between His Excellency the Governor of Bombay and His Highness the Thakore of Bhownugger, certain villages (including Ghangli) "are removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency from and after the 1st of February 1866." No further information was offered, though time was given for

the purpose; and the Division Bench, which heard the appeal, * rejected it on the ground that there was nothing to show that the jurisdiction of the High Court and of courts subordinate to it, which once existed, had legally ceased to exist.

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Subsequently, the appellant made a petition of review, and on its being shown that the transfer of the village of Ghangli from British to foreign territory was made by the order of the Government of India with the sanction of the Secretary of State, this Court considered that a good ground had been made out for the re-hearing of the special appeal, and accordingly granted the review.

The question of jurisdiction has now been formally argued before us.

The appellant's arguments, put shortly, amount to this, that the right to cede territory was vested in the Court of Directors in concert with the Board of Control, who had power to acquire territory and to make treaties with foreign princes, to which right the Secretary of State for India succeeded under the provisions of Sec. III., Chap 106 of 21 & 22 Victoria; that this Court, under Sec. 57 of the Indian Evidence Act, was bound to accept the territorial alterations notified in the proclamation in the *Bombay Government Gazette*; and, further, that this Court, being bound by the law, cannot but hold the cession to be valid under Sec. 113 of the same Evidence Act coupled with a notification in the *Gazette of India*, 4th January 1873, as follows:— "The Governor General of India in Council hereby notifies the fact that the villages mentioned in the schedule here below appended were, on the 1st February 1866, ceded to the State of Bhawnagar" (the village of Ghangli being included in the same schedule).

Whereas, on behalf of the respondents, it was urged, with much force and ability, that the power to cede territory, and

* See the Judgment printed in a note at the end of the case, p. 49.

1873. therewith to transfer the allegiance of subjects, was never
 D'AMODAR possessed by the Court of Directors, and, therefore, could not
 GORDHAN be transferred to the Secretary of State, such power resid-
 v. ing in the Imperial Legislature alone; that, therefore, the
 GANESH DEV- cession was invalid, and the recent notification in the *Gazette*
 RA'M. of *India*, made for the purposes of Sec. 113 of the Evidence
 Act, was worthless, it being *ultra vires* of the Legislative
 Council, as in various ways in defiance of Acts of Parliament;
 that the Legislature had no power to make retrospective
 laws; and, lastly, that even though the question of jurisdiction
 be decided against the respondents, the appellant having
 already attorned to the jurisdiction, cannot now be heard to
 object.

With regard to attorning to the jurisdiction, the respondents' argument appears altogether untenable; it is advisable, therefore, at the outset to dispose of that question. Certain English cases have been quoted to us in support of the contention that a suit can be carried on within British jurisdiction as regards land in foreign territory; but none of those cases go to the length of showing that parties out of the jurisdiction can litigate in a British Court to recover land situated out of British territory, and they clearly have no application to the present case. It is manifest that the acts and conduct of parties cannot of themselves give any Court a jurisdiction, not before possessed, over the subject matter in dispute; and it is also manifest that if the legal effect of the cession of territory notified was to remove the village of Ghangli out of the jurisdiction of the District Court of Ahmedabad, Secs. 3 and 37 of Act XXIII. of 1861 provided an absolute bar to the Judge's hearing this appeal.

Two main questions arise in this case, one as to the effect of the declaration in the *Gazette of India*, in January last, that territory has been ceded; and the other as to the validity and legality of the cession itself.

The power of the Indian Legislature to create such a statutory presumption having been challenged, on the ground that it affects the authority of Parliament, we find that the first of these questions involves an inquiry into the very serious one of the Crown's prerogative to cede territory.

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We prefer, then, first to consider, with regard to the second question, what rights for cession of territory were vested in the East India Company, for it is clear that only those powers, which the Company possessed "either alone, or by the direction and with the sanction of the Commissioners of the affairs of India," devolved upon Her Majesty's Secretary of State.

We know that from the time of their first Charter, granted by Queen Elizabeth in 1600 down to 1767, the Company were merely recognized as traders, but as their struggles with the French Company left them, at the peace of 1763, masters of a large portion of territory, their position attracted the attention of Parliament, and the House of Commons appointed a Committee to inquire into the nature of the Company's Charters, the inquiry resulting in their being continued, by 7 Geo. III. Ch. 57, Sec. 2, in possession of their territorial acquisitions and revenues, as well as their exclusive trade, until the 1st of February 1769, on condition of the payment of a certain annual sum. From this date, the Company's exclusive trade and government were renewed from time to time, until, by 3 & 4 Wm. IV., Ch. 85, their trade was suspended, except in so far as it might be carried on for purposes of government, their term of government being continued until the 30th of April 1854, and, finally, this term was renewed "until Parliament should otherwise provide," until, in fact, the passing of 21 & 22 Vict., Ch. 106, which transferred the Government of India to Her Majesty.

We see, then, that from the year 1767, when the East India Company's territorial acquisitions were first recognized as British territory, they were, from time to time, continued in possession of them, subject to the authority of Parliament.

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It is alleged that the Company, in concert with the Board of Control, had power to acquire territory, and to make treaties with foreign princes, and it is argued that they must have had power to cede territory also for the purposes of such treaties; but we see clearly that whatever powers the Company and Board possessed were derived from Parliament. All the Charters from 1767 expressly entrust the Company with possession and government of the British territories and appropriation of the revenues (as a necessary means of governing) for the Crown; and the Board of Commissioners was created with "full power and authority to superintend, direct, and control all acts, operations, and concerns which anywise relate to, or concern, the Civil and Military Government and revenues of the said territories and acquisitions in the East Indies." And, though it may be inferred that the Company and Board had power to levy war or make peace and to make treaties with native princes and states in India for guaranteeing their possessions, nowhere are we able to find any indication of an authority to dismember already existing British territories. On the contrary, it is a significant circumstance that Parliament expressly provided the Court of Directors with power, under the direction and control of the Board of Commissioners, to "declare and appoint what part or parts of any of the territories under the government of the Company should, from time to time, be subject to the government of each of the several presidencies then subsisting or to be established, and to alter, from time to time, the limits of the Presidencies and Lieutenant Governorships." If, therefore, special enactments were necessary to enable the Government of the country to make internal arrangements and distributions of British territories, *a fortiori* would it appear that, without such special enactment, they were incompetent to cede any portion of them.

Mr. Forsyth, in his Cases and Opinions on Constitutional Law, page 185, gives two instances of cession (not under treaty of peace) by the East India Company to a foreign state previous to 1858 :—

"1. In 1817 a cession by treaty 'in full sovereignty' to the Sikhumputtee Rajah of a part of territory formerly possessed by the Rajah of Nepaul, but ceded to the East India Company by a treaty of peace."

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"2. In 1833 a cession by treaty to Rajah Voorunder Singh of a portion of Assam lying on the south of the Burrampooter river, by which the Rajah bound himself, in the administration of justice in the country now made over to him, to abstain from the practices of former Rajahs of Assam, as to cutting off ears and noses, extracting eyes, or otherwise mutilating and torturing." Alluding to the latter case, Mr. Forsyth adds: "This is not a very satisfactory precedent, and it shows the kind of risks to which British subjects might be liable on being transferred to a semi-barbarous power."

And certainly these two isolated cases furnish no sufficient presumption of the existence of a prerogative of which we cannot find any trace in any of the various Acts defining the Company's *status* and powers.

Holding, then, that the power to cede territory was not one of the powers to which the Secretary of State succeeded under the Act transferring the Government of India to Her Majesty, we turn to consider the effect of the *Gazette of India's* notification.

Sec. 113 of the Evidence Act, which received the assent of the Governor General on the 15th March 1872, runs thus: "A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince, or Ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification." This section was first introduced in the amended Bill presented on the 30th of January 1872 to the Legislative Council of the Governor General with these remarks by the Select Committee: "A conclusive presumption is a direction by the law that the existence of one fact shall in

1873. all cases be inferred from proof of another. This we have provided in Secs. 112 and 113"; and "we have provided in the Chapter on the Burden of Proof that a notification in the Gazette that a territory has been ceded to a native prince shall be conclusive proof of a valid cession at the date mentioned in the notification. The object of this section is to set at rest questions which, as we are informed, have arisen on this subject."

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Our judgment in this case was passed on the 2nd December 1870 when there existed only the notification of the *Bombay Gazette* dated 29th January 1866; and we granted the review on the 16th December 1872, in order that it might be argued whether the sanction of the Secretary of State did not operate to create a valid cession. But on the 4th of January 1873 appeared in the *Gazette of India* the notification that the village of Ghangli, with several others, had been ceded seven years before; and we are now told that, even though the approval by the Secretary of State of the cession be not all sufficient, we cannot consider that question. No doubt this would be the effect of Sec. 113, provided that it lay within the power of the Legislative Council to make such a law.

What then are the powers of the Council of the Governor General? By Sec. 43, 3 & 4 Wm. IV., Ch. 85, the Governor General in Council was empowered to legislate for India, except that he "shall not have the power of making any Laws or Regulations which shall, in any way, affect any prerogative of the Crown or the authority of Parliament * * * or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend, in any degree, the allegiance of any person to the Crown of the United Kingdom, or the sovereignty and dominion of the said Crown over any part of the said territories."

This section was repealed by Sec. 2, Act 24 & 25 Vict., Ch. 67, "The Indian Councils' Act"; but by Sec. 22 of this Act, it was again provided that "the Governor General in Council shall not have the power of making any Laws or Regulations * * * which may affect the authority of Parliament * * * or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend, in any degree, the allegiance of any person to the Crown or the sovereignty and dominion of the said Crown over any part of the said territories." Further on, in Sec. 24 of the same Act, we find "that no Law or Regulation made by the Governor General in Council (subject to the power of disallowance by the Crown, as hereinbefore provided,) shall be deemed invalid by reason only that it affects the prerogative of the Crown."

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It is a notable circumstance that the wording of the repealed Section of 3 & 4 Wm. IV., Ch. 85, and of Sec. 22 of the Councils' Act, substituted for it, differs only in one particular, i.e., that in the latter the words "prerogative of the Crown" are omitted, nor is it easy to understand the reason for this omission. Prior to this Act, no general power was given to the Crown to disallow laws made by the Legislative Council.

Sec. 26 of 16 & 17 Vict., Ch. 95, declared "that no law or regulation was to be invalid by reason only of its affecting any prerogative of the Crown, provided it had received the previous sanction of the Crown signified in a prescribed form;" and the Councils' Act, which repealed this, made express provision for the transmission to the Secretary of State for India of copies of all laws and regulations assented to by the Governor General and for their disallowance by Her Majesty.

In neither case was any law affecting the prerogative of the Crown to be deemed invalid, provided that before the passing of the Council's Act, the Crown had previously sanctioned it, or that after that period it had not been disallowed.

1873. But the law expressly prohibiting the Legislative Council of India from making any law affecting the authority of Parliament is, in no way, varied or altered by the Indian Councils' Act.

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The value, therefore, of Sec. 113 of the Evidence Act depends on the constitutional question of prerogative. If the Crown alone has power to cede territory, then this provision of the law is valid and binding so long as it is not disallowed; but if, on the other hand, that power can only be exercised with the authority of Parliament, it follows, as a matter of course, that the Legislative Council exceeded its power and that Sec. 113 was, and must continue to be, bad law.

On this point, we have been referred to the opinions of Grotius, Vattel, Puffendorf, Chalmers, Wheaton, Phillimore, and Twiss, who all appear to support the proposition that no power resides in the Crown to cede territory, save under circumstances of necessity. Most of these writers are referred to by Mr. Forsyth in the work to which we have alluded above, and the conclusion at which he appears to arrive is that while the Crown can, by virtue of its prerogative, without any doubt, make cessions by treaty of peace at the close of a war, its power to cede territory in any other way is extremely questionable. Vattel, Puffendorf, and Grotius may or may not be accepted as authorities, but Mr. Forsyth strengthens his opinion by a consideration of known precedents. He quotes various instances of cessions made in adjustments of quarrels between nations, but can only find two in support of the Crown's unconditional prerogative—the case of the Orange River Territory and the sale of Dunkirk by Charles II.; and the latter of these two he regards, with much reason, as hardly a constitutional precedent. With reference to the Orange River Territory, we have been unable to consult the correspondence to which reference is advised; but as it is questionable whether the British nation ever acquired a right of property in the territory, it may be more easily allowed that it was in the power of the Crown to rescind that which

it had ordained, by its letters patent, without reference to Parliament. The cases, moreover, are not analogous, for the British territories in India have been the subject of Parliamentary Legislation from the time of their acquisition, and have become thereby a material part of the property, and, therefore, of the body of the State.

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It appears to be considered by some, *vide* Lord Palmerston's speech in the debate on the relinquishment by the British Crown of the Protectorate of the Ionian Islands, that a distinction exists between cessions of British freehold and of territory acquired by conquest during war and not by treaty or ceded by treaty and held as possession of the British Crown; but the cases he quoted were all, observes Mr. Forsyth, cessions at the close of a war. On what principle can such a distinction rest?

All subjects of the Crown possess the same rights and incur the same obligations. Allegiance, by the English law, is correlative with protection, and is to be looked upon as a relation, not only between a sovereign and subjects, but as between a corporation and its members.

That Her Majesty's subjects in India have the same rights with all her other subjects is clear from the Queen's proclamation of 1858; and the same fundamental rule, restricting the prerogative of the Crown from interference with the allegiance of subjects and their right to protection, must apply equally to all and every part of Her Majesty's dominions.

Vattel's arguments, on the principles involved, commend themselves to our reason. In his Book 1, Ch. 21, Sec. 263, he says: "A nation ought to preserve itself; it ought to preserve all its members; it cannot abandon them, and it is under an engagement to support them in their ranks as members of the nation. It has not then a right to traffic with their rank and liberty on account of any advantage it may expect to derive from such a negotiation. They have joined the society for the purpose of being members of it.

1873. They submit to the authority of the State for the purpose of promoting in concert their common welfare and safety, and not of being at its disposal like a farm or a herd of cattle. But the nation may lawfully abandon them in a case of extreme necessity, and she has a right to cut them off from the body, if the public safety requires." In considering, further, whether the Prince has power to dismember the State, he says that "this depends on whether he has received full and absolute authority from the nation;" and proceeds: "The nation ought never to abandon its members but in a case of necessity or with a view to the public safety, and to preserve itself from total ruin; and the Prince ought not to give them up for the same reasons. But since he has received an absolute authority, it belongs to him to judge of the necessity of the case, and of what the safety of the State requires."

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We have no knowledge of the reasons which induced the transfer of Ghangli and other villages to the State of Bhavnagar, but it is certain that there existed no such necessity as is recognized by the publicists.

If, then, it be a fundamental law that the sovereign cannot of himself dismember territories, and that he can only do so with the sanction of the people in cases of real necessity, it follows that the Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace.

Further, if the sanction of Parliament be necessary for a cession in times of peace, and if allegiance be indefeasible, it follows that such a direction of the law as the one we are contemplating, must of necessity affect the authority of Parliament, and those unwritten laws and constitution of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.

This being so, Sec. 113 of the Indian Evidence Act, though not disallowed, is not protected by Sec. 24, 24 & 25 Vict., Ch. 67, and we cannot, therefore, follow its directions.

For these reasons, we decline to alter our decision, which will, therefore, stand. Costs on appellant.

Note.—The judgment in the original special appeal in the above case was delivered on the 2nd December 1870, as follows :—

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No attempt has been made to support the second objection raised in this special appeal, and the only point which we have to determine is whether, as has been urged, "the Judge had no jurisdiction to try the appeal, because the village in which the land is situated was removed from the jurisdiction of the Civil Courts long before the appeal was decided."

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The circumstances are these. The suit was instituted in the year 1864 in the Court of the Munsif of Gogo, who awarded the plaintiff possession of the land sued for on payment of the amount of the mortgage, viz., Rs. 60. On the 18th January 1866, this decree was reversed by the Assistant Judge of Ahmedabad; but the case coming before the High Court on special appeal, it was remanded for fresh decision under date 21st December 1866, and, in accordance with this order, was disposed of by the Acting Judge of Ahmedabad on the 11th August 1869.

The disputed land is situated in the village of Ghangli, within the Pargana of Gogo (*vide* Act VI. 1859), and that Pargana forms part of the Zillah of Ahmedabad, as established by the second clause of Section 16, Regulation II. of 1827.

But it is argued that the village of Ghangli had been removed from the jurisdiction of the Civil Courts of the Bombay presidency previous to the disposal of the case by the District Judge of Ahmedabad; and that, consequently, his decree is illegal.

This argument is founded on a notification dated 29th January 1866 and published at page 197 of the *Bombay Government Gazette* for that year. It runs as follows:—

"Revenue Department.

"It is hereby notified that, in accordance with a convention made between His Excellency the Governor of Bombay and His Highness the Thakore of Bhawnagar, the undermentioned villages belonging to the Thakore of Bhawnagar, and situated in the Parganas of Dhundooka, Rampoor, and Gogo, Zilla Ahmedabad, are, from and after the 1st of February 1866, Sunvut 1922 Maha Vud 2nd, removed from the jurisdiction of the Revenue, Civil and Criminal Courts of the Bombay Presidency, and transferred to the supervision of the Political Agency in Kattiawar, on the same conditions as to Jurisdiction as the villages of the Talooka of the Thakore of Bhawnagar heretofore in that province.

Sehore Talooka.

Ghangli.

By order,

(Signed) F. S. CHAPMAN,

Chief Secretary to Government

Bombay Castle, 29th January 1866."

1873. This notification, it may be observed, though signed by the Chief Secretary to Government, does not state by what authority it was issued; merely "by order." Appearing however, as it does, in the *Government Gazette*, and under the signature of the highest Ministerial Officer under Government, it may be assumed that it was issued by order of His Excellency the Governor in Council. But the notification is defective in a far more material point, for it omits to recite the law which was supposed to confer on the Governor in Council the power to limit the jurisdiction of the Civil and Criminal Courts of this Presidency.

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It has not been shown to us that any such law exists; and, on the contrary, we find that at the time this notification was issued, Section 6 of Regulation I. of 1827, which provides that "Regulations are to be in force at such places and from such periods as may be declared in a Regulation actually in force," was unrepealed, and as the Regulation establishing the Ahmedabad Zilla, of which the village of Ghangli forms a part, was also unrepealed, it follows that a legal enactment was necessary to effect the object which Government had in view when issuing the notification referred to. It was suggested in the course of the argument that the notification might have been issued under clause 2, Section XVI., Regulation II. of 1827; but even admitting that this law gives the Governor in Council power to cede territory, no authority could be assumed to exist in that body summarily to abrogate any law in force in such territory in the face of Section VI., Regulation I. of 1827.

That this notification is inefficacious is still more apparent when we come to look at the full force it was intended to have, for it purports to affect, not only the Local Courts, but also the High Court, which under Section I., Regulation II. of 1827 and Stat. 24 & 25 Victoria, Cap. 104, H C 9, has jurisdiction over all the territories subordinate to the Presidency of Bombay in which the Code of Regulations has operation by enactment. It seems to us, therefore, that the notification referred to is, as far as the argument in this case is concerned, of no effect whatever, and that the village of Ghangli not having been legally removed from the jurisdiction of the District Court of Ahmedabad, the decree of the Judge must be upheld.

[APPELLATE CIVIL JURISDICTION.]

1873.
April 1.*Referred Case.*

GULABHA'I MONDA'S.....Plaintiff.

DAYA'BHA'I GOVARDHANDA'SDefendant.

Parties bound by their deed till rectified—Mistake in deed—Rectification by Court—Small Cause Court—Jurisdiction.

The plaintiff sold to the defendant a field containing a well, Tax was payable to Government on the field as well as a tax on the well. The deed of sale expressly provided for the payment of the tax on the field by the defendant, but was silent as to the tax on the well. Government recovered the amount of the tax on the well from the plaintiff for 1871, as the well stood entered in the Government Books in the plaintiff's name. The plaintiff sued to recover the amount from the defendant.

Held that under the deed of sale the defendant was not liable to reimburse the plaintiff the amount paid by him to Government.

Held also that if the omission in the deed of sale, to provide for the payment of the tax on the well by the defendant, should have arisen from a mistake, his only remedy was a suit for reforming the deed so as to make it in accord with the actual agreement between the parties at the time of the sale.

The amount and nature of proof required of plaintiff in such a case, pointed out.

A Small Cause Court has no power to entertain a suit for the reformation of a deed.

THE following question was referred by Gopálráv Hari Deshmukh, Judge of the Small Cause Court at Ahmedabad, for the consideration of the High Court:—

“Whether or not a man who uses a well is bound to pay the tax on it, though the deed of purchase by which he has obtained his right to the well, is silent as to his liability to pay it.

“The facts of the case are as follows:—

“The field No. 963 is assessed at Rs. 11, and is held by the plaintiff. No. 956 was also held by him, but has been sold by him to the defendant.

1873. "The field No. 957 is held by two persons, a 'Gosávi' and an 'Ora.'
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"The well was sunk by the Gosávi, the Ora, and the plaintiff. The Gosávi has $\frac{1}{2}$ share in it, the Ora $\frac{1}{4}$, and the plaintiff $\frac{1}{4}$.

"There is a tax called 'Kus' on the well, of Rs. 30 per annum, payable to Government. Of this sum, the Gosávi pays Rs. 15, the Ora Rs. 7, and the plaintiff Rs. 8.

"The tax on the field No. 963, Rs. 11, and the portion of the tax on the well, Rs. 8, are entered together in the accounts of the plaintiff with the Collector, probably because the plaintiff used to water his field No. 963 from the well. The consequence is that the Collector recognizes the plaintiff as the tax-payer and recovers Rs. 19 from him.

"The plaintiff sold his field No. 956 with his share in the well to the defendants in 1870. The deed of sale (a copy of which is appended) states that he is to pay the tax on the field but is silent as to his liability to pay the portion of tax on the well, though it gives him permission to use it to the extent to which the plaintiff used it.

"The Collector recovered the portion of the tax of Rs. 8 from the plaintiff in 1871.

"The plaintiff, therefore, claims to recover the same with Rs. 1-3-0 as damages from the defendants who used the well.

"The defendants state that their understanding was that they should use the well, but not pay the tax of Rs. 8 which was entered in the accounts of the plaintiff and not in the account of the field No. 956. There was, therefore, no stipulation made in the deed of sale, though the payment by them of the tax on field No. 956 was specially provided for in it.

"My opinion is that the tax should be paid by the defendants who use the well. It is true that there is no stipulation in the deed, but it was the duty of the purchaser to have made the matter clear."

The question was considered by WESTROPP, C.J., and MELVILL, J., on the 1st April 1873.

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PER CURIAM:—If this case is to be regarded as resting solely upon the deed of the 25th December 1870 executed by the plaintiff to the defendants, the defendants are not liable to reimburse the plaintiff the amount of the tax paid by him to Government in respect of the well, inasmuch as the deed expressly provides for the payment by the defendants of the tax on the field and is silent as to the payment by them of the tax on the well. This view as to the non-liability of the defendants for the tax on the well is founded on the familiar rule of construction of deeds *expressio unius est exclusio alterius*—see Broom's Maxims of the law. If there be good reason for supposing that there has been a mistake in the deed of sale of the 25th December 1870, in omitting to provide for the payment of the tax upon the well by the defendants, the only remedy open to the plaintiff is to bring a suit, praying that the deed should be reformed so as to accord with the actual agreement between the parties at the time of the sale to the defendants. In such a suit, the plaintiff is required to prove, beyond all doubt, that there was a mistake in the deed, and it is a suit in which it is extremely difficult to succeed. (As to the necessary proof, and as to the effect of delay in seeking relief; see 1 Story's Equity Jurisprudence, pl. 153 to 169 inclusive; and *Bunbury v. Lloyd* (a), *Mortimer v. Shortall* (b), *White v. Anderson* (c), *Harris v. Pepperell* (d), *Sells v. Sells* (e), *Druiff v. Lord Parker* (f), *De La Touche's Settlement* (g), *Bloomer v. Spittle* (h), *White v. White* (i). The Small Cause Court would not have jurisdiction to entertain such a suit.

(a) 1. Jo. Lat. & 638. (b) 2. Dru. & War. 363. (c) 1. Jr. Ch. Rep. 419.

(d) L. R. 5 Eq. 1. (e) 1. Dr. & Sm. 42. S. C. 29 L. J. Ch. 550.

(f) L. R. 5 Eq. 131. (g) 1. R. 10 Eq. 599. (h) L. R. 13 Eq. 427.

(i) L. R. 15 Eq. 247.

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April 1.

[APPELLATE CIVIL JURISDICTION.]

Referred Cases.

- (1) GEORGE BRIDGE.....*Plaintiff.*
EDALJI MANCHARJI*Defendant.*
- (2) VITHAL AMBA'RA'M*Plaintiff.*
DAYA'BHA'I MURLIDHAR*Defendant.*

Award—Small Cause Court—Jurisdiction to file Award—Civ. Proc. Code, Sec. 327.

A Small Cause Court has power, under Section 327 of the Civil Procedure Code, to file an award for a sum not exceeding Rs. 500, and to proceed under that section, if the defendant reside within the jurisdiction of the Court.

THESE cases were referred for the opinion of the High Court by Syad Hussein El Medini, Judge of the Courts of Small Causes at Broach and Surat, with the following observations :—

“This is an application under Section 327 of the Code of Civil Procedure.

. * * * * *

“The award, presented with the application, relates to a debt.

“Section 47 of Act XI. of 1865 (the Mofussil Small Cause Courts Act) is as follows :—‘Except as hereinbefore provided, the provisions of the Code of Civil Procedure shall, so far as the same are or may be applicable, extend to all suits and proceedings under this Act.’

“It does not direct that Act VIII. of 1859 shall be the procedure of the Small Cause Court, as Section 388 of the Code does with respect to the ordinary Civil Court. It simply means that the provisions of the Act will apply to suits and proceedings made cognizable by the Small Cause Court Act.

"I have, therefore, to ascertain whether the application under reference has been made cognizable by the Small Cause Court Act. There is nothing in this Act which makes an application like this cognizable by this Court.

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"Moreover, the provisions of Section 327 of the Code have been incorporated into Sections 524 and 525 of the new Bill as settled by the Select Committee for consolidating and amending the laws relating to the procedure of the Courts of Civil Judicature, and the Small Cause Courts have been expressly exempted from the operation of these sections. Section 3 of the Bill is as follows:—'The sections having the letters S. C. C. affixed to them in a parenthesis extend (so far as they apply or are applicable) to Courts of Small Causes. The other sections do not extend to such Courts.' Sections 524 and 525 above referred to have not the letters S. C. C. affixed to them, and, therefore, they do not extend to the Small Cause Courts. * * *

"Now, if the Legislature itself had not volunteered to declare its intention respecting the non-applicability of the provisions of Section 327 of the Code of Civil Procedure to Courts of Small Causes, I should have distrusted my own judgment and followed the decision of Sir Barnes Peacock, C.J., and Dwarkanath Mitter, J., in *Elam Puramanick v. Seofaetullah Sheikh* (a) which is as follows:—'If the award relate to a debt, not exceeding the amount cognizable by a Small Cause Court, we are of opinion that the Small Cause Court has jurisdiction, under Section 327, Act VIII. of 1859, to entertain an application to file the award, provided the defendant resides within the jurisdiction. In such a case, the Small Cause Court would have jurisdiction over the matter to which the award relates.'

"The second plaint is an action on an oral award to recover Rs. 110. It is alleged in the plaint that the parties had submitted to the arbitration of a third man who pronounced his award orally in pursuance of this submission. The submission to the arbitration was also not in writing.

(a) 10 Calc. W. R. Civ. Rul 85.

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"The question is whether this action will lie in a Small Cause Court.

"Under the ruling of the Bengal High Court published at page 76, Weekly Reporter for 1864, Civ. Rul, it appears 'that a submission of private arbitration may be perfectly valid, though not put in writing, and a private award made in pursuance of such submission may be proved by the arbitrators themselves.' And as there can be no doubt that 'debt' will lie upon an award of this kind, the plaint comes within the purview of Section 6 of Act XI. of 1865.

"As this decision of the case creates the anomaly that whereas a suit will lie in a Mofussil Small Cause Court on an award, yet the summary application provided for by Section 327 of the Code cannot, for the reasons stated above, be entertained by the said Court, I have deemed it advisable to submit this case also for the decision of their Lordships."

The cases came on for consideration before WESTROPP, C. J., and MELVILL, J., on the 1st April 1873.

PER CURIAM:—This Court concurs in the case (*Elam Puramanick v. Sefaetullah*) cited by the Judge of the Court of Small Causes at Surat, and replies to the Judge by saying that he has power to file, under Section 327 of the Civil Procedure Code, an award for a sum not exceeding Rs. 500, if the defendant reside within his jurisdiction, and to proceed under that section.

[APPELLATE CIVIL JURISDICTION.]

1873
April 1.

Referred Case.

RA'MJI MANORPlaintiff.

F. D. LITTLEDefendant.

*Master and servant—Monthly servant leaving service without notice—
Forfeiture of wages.*

Where a servant, who was engaged by the month, served from the 1st November to the 3rd December 1872 and left his master's service on the 4th December, without giving notice :—

It was held that the servant was entitled to be paid his wages up to the end of November but forfeited the wages payable to him in respect of his December services.

THIS was a reference from Gopálráv Hari Deshmukh, Judge of the Small Cause Court at Ahmedabad.

“ I. The question is whether the English Law of Master and Servant is applicable to a case in the Small Cause Court in which the defendant is an Englishman ?

“ II. If so, a servant, on leaving his master's service without notice, forfeits a month's pay, but does the month mean 30 days before date of leaving or the portion of the current month, preceding the day on which the servant left ?

“ III. The plaintiff has filed this suit for the recovery of his wages for one month and three days, *i.e.*, from 1st November to 3rd December 1872, and it is proved that the plaintiff was a monthly servant receiving Rs. 15 a month, and that he left his master's service, without due notice, on the 4th December 1872.

“ IV. The defendant states that he would pay the plaintiff for three days of November and withhold one month's pay from 4th November to 3rd December 1872, that being the month preceding the day of leaving.

1873. "V. I think the English law is applicable, and that the
 RA'MJIMANOR plaintiff, having served for the full month of November, is
 F. D. LITTLE. entitled to receive his wages due on the 1st December, and that
 as he has left the service, without leave, on the 4th December, he should receive no pay for three days of that month only."

The reference came on for disposal before Westropp, C.J., and Melvill, J., on the 1st April 1873.

PER CURIAM:—Without laying down any general rule as to the application of the English law to this case, the Court is of opinion that the servant ought to be paid his wages up to the end of November and to forfeit those for December.

[INSOLVENCY JURISDICTION.]

April 2.

In re SITA'RA'M ABBA'JI.

Ex parte SUNDARDA'S MULJI.

Insolvency—Death of insolvent—Vesting order, Effect on—Official Assignee—Stat. 11 & 12 Vict., c. 21—Abatement.

The death of an insolvent before obtaining his discharge does not affect the right of the Official Assignee to deal with the property of such insolvent, nor does it cause the proceedings in such Insolvency, so far as the Official Assignee and the creditors are concerned, to abate.*

THIS was an application made on behalf of Sundardás Mulji for the opinion of the Insolvent Court on the question, whether an abatement of proceedings in Insolvency takes place upon the death of the insolvent before obtaining his final discharge.

The application was made at the request of the Official Assignee.

* Note.—See *In re Ramsabuck Misser* (6 Beng. L. R. 119), and *In re King* (Coryton's Indian Insolvent Act p. 18); *sed quære* as to this last mentioned case.—Ed.

The question arose in the following manner :—The insolvent, Sitárám Abbáji, on the 19th of August 1871, entered into an agreement to sell to Sundardás Mulji a house. Sitárám Abbáji did not perform this agreement, and Sundardás Mulji sued him in the High Court for specific performance. While that suit was pending, Sitárám Abbáji, on the 14th of September 1872, filed his petition and schedule in the Insolvent Court, and, thereupon, the usual vesting order was made, vesting his property in the Official Assignee. The letter on consideration of the agreement for sale, having come to the conclusion that Sundardás Mulji was entitled, on payment of the balance of the purchase money, to a specific performance of his agreement with the insolvent, was about to execute a conveyance of the premises, the subject of the agreement, to Sundardás Mulji, when before completing the conveyance and before obtaining his order of discharge, the insolvent, Sitárám Abbáji, died. The Official Assignee, thereupon, feeling doubtful as to the effect of such death upon the insolvency proceedings and as to his right under the circumstances to complete the conveyance to Sundardás Mulji, requested him to move for the direction of the Court in the matter.

Lang, on 19th of March 1873, moved, accordingly, before Gibbs, J., sitting as Commissioner in the Insolvent Court. He contended that the vesting order had the effect of a conveyance, and that the death of the insolvent did not alter the right of the Official Assignee to deal with the property vested in him by the vesting order, in accordance with the provisions of the Insolvent Act. He referred to cases cited in Archbold on Bankruptcy p. 564 (11th edition).

Cur. adv. vult.

GIBBS, J.:—In this case, the Official Assignee applied by counsel for instructions how to proceed in the matter, the insolvent having died after the petition and schedule were filed and the vesting order was made.

The early English cases have been quoted, but they all seem to turn on the fact of statutable provision for the continuance of proceedings after the death of the bankrupt, having been made as early as 1 Jac. 1.

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Mr. Marriott, in the case of *Bhugwanjee Dwardkass*, argued in favour of the negative of the question, but did not produce authorities of much moment, certainly not such as to guide me; and as his application was disposed of by being granted under a rule of the Court, I cannot deem that his argument was an answer to Mr. Lang's or was complete.

From the best consideration I have been able to give to the matter, I think the Official Assignee should be instructed to proceed, so far as circumstances will admit, with the insolvency in the same manner as he would have done, had the insolvent been living. The property was, by order under the 7th Section, vested in the Official Assignee in trust for the creditors, and I cannot find any authority for holding that the death of the insolvent supersedes or nullifies that order.

Had the legislature intended that the death of the insolvent should produce such a result, it would most probably have said so, as it has said in the proviso in the 7th section of the Act with regard to the dismissal of the insolvent's petition. I think that the Official Assignee may proceed as usual.

[ORIGINAL CIVIL JURISDICTION.]

April 19.

GRAHAM AND OTHERS.....*Plaintiffs.*
HILLE *Defendant.*

Bill of lading—Construction of Exceptions—Leakage—Breakage—Damage caused to goods by leakage from other goods.

Piece goods were carried from London to Bombay under a bill of lading, the exceptions in which protected the master from "*leakage, breakage, rust, decay, loss, or damage from machinery boilers misfeasance, error in judgment, negligence or default of persons in the service of the ship . . . and the ship not being liable for any consequences of causes therein excepted however originating.*"

The piece goods, on their arrival in Bombay, were found to be damaged by oil and by chafing, *i.e.*, by rubbing against other goods in the hold, but there was no evidence to show how such damage was occasioned

Held that the term "leakage" did not include leakage from other goods on to the piece goods, nor did "breakage" include damage caused by chafing, and that, as no negligence was proved, the master was not protected by the exception "damage from negligence."

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THIS was a case stated for the opinion of the High Court, under Sec. 7 of Act XXVI. of 1864, by John O'Leary, First Judge of the Bombay Court of Small Causes. It was as follows:—

"In this case the plaintiffs sought to recover from the defendant Rs. 538 as compensation for damage done to the goods of the plaintiffs, forming portion of the cargo of the ship "St. Olaf" on a voyage from Europe to Bombay.

"The goods were what are commonly known as piece goods. The damage alleged to be caused to one bale was to the extent of Rs. 443-12, by oil having come in contact with the bale; and damage to the several other bales, to the amount of Rs. 94-8, by 'chafing,' that is, by the bales rubbing against other portions of the cargo near them.

"The defence was that the defendant was exempted from liability as to each kind of damage by certain clauses in the bill of lading.

"No evidence was adduced by either the plaintiffs or the defendant as to the particular circumstances, under which the damage was caused, but it was not denied that the damage occurred during the course of the voyage, and the amount of damage was not disputed by the defendant.

"It was contended for the defendant that the damage caused by oil came under the exemption of 'leakage' in the bill of lading and also under the head of 'perils of the seas.'

"It was contended that the damage caused by chafing came under the head 'perils of the seas' and 'breakage.'

"A considerable amount of evidence as to the custom of the Port of Bombay was given for the plaintiffs, the result of which was that under bills of lading, similar to the pre

1873. sent one, it is the custom for ships to be responsible for
 GRAHAM AND such damages, but that hitherto the amount of such damage,
 OTHERS in any one case, has been very small, and has, in no case
 v. known to the witnesses, equalled in amount that claimed in
 HILLE. the present case.

“ I was of opinion that in cases like the present, independently of any custom of the port, the ship is liable for damage like the present, unless it be provided in the bill of lading, or other contract, between the parties, that the ship shall be exempt; and I was of opinion that oil damage suffered by piece goods did not come under the head of leakage, and that there was no evidence that it was occasioned by ‘perils of the seas’ in the present case; and the bill of lading did not exempt the ship from liability.

“ And I was of opinion that ‘chafing’ did not come within the exception as to breakage, and that there was no evidence that it was caused by ‘perils of the seas,’ and that the bill of lading did not exempt the ship from liability. And I found a verdict for the plaintiffs, for the amount claimed, contingent on the opinion of the High Court, as to whether the defendant was liable, or was exempt as aforesaid. ”

The bill of lading referred to in the case, so far as it is necessary to set it out, was as follows :—

“Shipped in good order and condition by William Graham and Company in the Steam Ship “St. Olaf,” whereof is master for this present voyage Hille, lying in the Port of London and bound for Bombay (having liberty to call at any port or ports, &c.), five hundred and seventy-five packages merchandise, being marked and numbered as per margin, and to be delivered in the like good order and condition from the ship’s deck (where the ship’s responsibility shall cease) at the aforesaid Port of Bombay or so near thereto as she may safely get (the act of God, the Queen’s enemies, pirates, robbers by land or sea, restraint of princes, rulers or people, vermin, rain, spray, insufficient packing, inaccuracies, absence of marks, numbers, address or description of goods shipped, leakage, breakage, rust, decay, loss or damage from machinery, boilers, or steam however caused; or from collision, stranding, or wreck however caused, or from explosion, heat, or fire on board, in hulk or craft, or on shore however

caused, or from evaporation or smell from other goods, jettison, barratry, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship whether in navigation of the ship or otherwise, risk of craft, or hulk, or transhipment, and all and every the dangers and accidents of the seas, land, and rivers, and of navigation of whatsoever nature or kind being excepted; and the ship not being liable for any consequences of causes herein excepted however originating, nor liable for incorrect delivery unless each package shall have been distinctly marked by the shippers before shipment with the name of the port of destination in letters not less than two inches long) unto Messrs. W. and H. Graham and Company or to his or their assigns."

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The case was argued, on the 19th of April 1873, before WESTROPP, C.J., and SARGENT, J.

Austey and *Farran* for the defendant:—It is now well established law that the master of a vessel can, by special agreement, completely limit his liability in respect of damage caused to, or loss of, goods which he contracts to carry, and the Court will not go into the question of the reasonableness or the unreasonableness of the contract: *Phillips v. Clark* (a), *The Duero* (b), *Tanbruan v. Pacific Steam Navigation Company* (c). That being so, the only question is—are the exceptions in the bill of lading wide enough to cover the damage caused to the piece goods in the present case? (1)—There is no reason why "leakage" should be limited to loss by leakage from the goods carried. It will include, in its natural sense, damage caused to goods (e.g., piece goods) by leakage from contiguous goods. The cases of *Ohrloff v. Briscall* (d), *Czech v. Steam Navigation Company* (e), show that the Courts give an extended meaning to the term "leakage."

(2.) The exception "damage from negligence*** however originating" also protects the master. If negligence in stowing the cargo will, under circumstances like the present, not be presumed, the injury must fall under the exception "pe-

(a) 2 O. B. (N. S.) 156. (b) L. Rep. 2 Ad. & Ec. 393.

(c) *Aspinal*. Mar. L. Ca. 336. (d) L. Rep. 1 P. C. 231.

(e) L. Rep. 3 C. P. 14.

1873. rils of the seas," but the Court, we contend, will presume
 GRAHAM AND negligence. It is only on the assumption that there has been
 OTHERS negligence that the plaintiffs can recover; but by the exception
 v. the master is protected from the consequence of negligence.
 HILLE.

[Westropp, C. J.—This is an action of contract, not of delict. It is for the defendant to show that he is within the exceptions.]

The concluding words "however originating" extend the term "damage by negligence" and render it equivalent to the general term "damage" which protected the master in *Ohrloff v. Briscall*.

Breakage includes "chafing." By chafing, minute particles of the piece goods are in fact broken.

The Freedom (f), *Peninsular and Oriental Steam Navigation Company v. Shand (g)*, and *McCawley v. The Furness Railway Co. (h)*, were also cited.

Macpherson for the plaintiffs:—All the cases cited—*Phillips v. Clark* and *The Duero*—are cases in which the leakage was of the plaintiff's own goods, and for the loss occasioned by such breakage the suits were brought. I have not been able to find a single case like the present where exemption was claimed under an exception of leakage from liability for damage done to goods by the leakage from other goods, and "*The Nepoter*" (i) points to an opposite conclusion to that contended for by the defendant. When the master intended to protect himself from damage done by other goods to the goods mentioned in the bill of lading, he did so expressly—see the exception as to damage caused by "evaporation or smell from other goods." It would have been easy to insert the word "leakage," if damage like the present was intended to be excepted. The maxim *expressio unius alterius exclusio* applies. The bill of lading will be construed most strongly against the master of the ship, as it is his document. If it is ambiguous, the

(f) L. Rep. 3 P. C. 595. (g) 3 Moo. P. C. [N. S.] 272.

(h) L. Rep. 8 Q.B. 57 (i) L. Rep. 2 Ad. & Ec. 375.

custom of the Port will be admitted in evidence to explain it : *Leake* on Contracts pp. 110 and 111 where the cases are cited. 1873. GRAHAM AND OTHERS v. HILLE.

Then as to negligence, it is admitted that the master can contract so as to exempt himself from liability in respect of damage caused by it, but then if he relies upon such an exception, he must prove negligence. It was not for the plaintiff to prove negligence and so put himself out of Court. The Court will not presume negligence, as the oil may have reached the bales in many ways without there having been negligence on the part of the master or crew. This is an action founded on contract; therefore, proof of the shipment of our goods in good order and of their receipt by us in bad order is sufficient to entitle us to recover, unless the master shows some defence founded on the exceptions in the bill of lading. *The Freedom (supra)*; *The Duero (supra)* and *Tronson v. Dent (i)*.

Anstey in reply :—In *The Nepoter* the damage was held not to have occurred from leakage but from evaporation. It has not been shown that the master was aware of the alleged custom of the Port of Bombay when he signed the bill of lading. Evidence of such custom, therefore, even if it existed cannot be admitted to explain the bill of lading : *Kirchner v. Venus (k)*.

WESTROFF, C.J.:—This is an action upon the contract contained in a bill of lading, which states that the goods, comprised in it, were shipped in good order and condition, and were to be delivered in the like good order and condition. The goods were not so delivered, one bale of piece goods having been damaged by oil, and other bales having been injured by chafing. The goods, then, not having been delivered in accordance with the conditions of the bill of lading, it lay on the defendant to prove that the damage sustained by the goods came within the exceptions contained in the bill of lading or some of them.

(i) 8. Moo. P. C. 419.

(k) 12 Moo. P. C. 361.

1873. As to the damage by oil, it was first contended, on the
 GRAHAM AND part of the defendant, that the case came within the term
 OTHERS "leakage", but we think that argument is not maintainable.
 v. The term "leakage" in the bill of lading is, in our opinion,
 HILLE. applicable only to the goods comprised in that bill, and does
 not extend to damage caused to such goods by leakage from
 other parts of the cargo.

The defendant next contends that he is protected by the word "damage" being amongst the exceptions, but the term "damage" is especially restricted by the words which follow it. Those words are "from machinery, boilers, or steam however caused, or from collision, stranding, or wreck however caused, or from explosion, heat, or fire * ** however caused, or from evaporation, or smell from other goods, jettison, barratry, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship whether in navigation of the ship or otherwise, risk of craft, or hulk, or transshipment." It is manifest that the damage in respect of which the master is protected, is damage arising from these enumerated causes and not damage generally; but then it is said that these restrictions on the kind of damage are got rid of by the last words "the ship not being liable for any consequences of causes * ** however originating," but the expression used is *not* "consequences of causes however originating" but consequences of causes *herein excepted* however originating, and we think that the words "however originating" refer only to the causes excepted in the bill of lading, that is, (when applied to damage) damage of the kind distinctly excepted in the bill of lading and (when applied to leakage) leakage of the kind excepted in the bill of lading—leakage from the goods carried under the bill of lading however that leakage may originate.

One stipulation in the bill of lading strongly supports the conclusion we have arrived at; it is that damage from evaporation or smell from other goods is expressly provided for. When the master intends to protect himself from damage, caused in a particular way by other goods to the goods carried, he uses apt words to effect that purpose.

Then as to the injury caused to the piece goods by chafing, we think that that does not come within the exception "breakage." It is not stated in the case that the goods have been cut or that their continuity has been severed. What the case describes is chafing by rubbing—by the bales rubbing against other portions of the cargo near them. We have arrived at our decision on this point with some doubt, but on the whole we are of opinion that chafing of the kind described by the learned Judge of the Small Cause Court does not come within the exception. Lastly; there is no proof of negligence, and it was for the master, if he could, to prove that the case came within that exception in the bill of lading. We are, therefore, of opinion that the Judge has come to a right decision and that judgment was properly given in favour of the plaintiffs. The plaintiffs must have their costs. In deciding this case we must not be understood as basing our judgment in any degree upon what the Judge has stated with reference to the custom of the Port.

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Attorneys for the plaintiffs : *Hearn, Cleveland, and Peile.*

Attorneys for the defendant : *Rimington, Hore, and Langley.*

[APPELLATE CRIMINAL JURISDICTION.]

1873.
March 27.

Criminal Reference No. 21 of 1873.

REG. v. JETHA' BHALA'.

Compounding offence—Voluntarily causing hurt—Withdrawal—Crim. Proc. Code, Sec. 188.

The offence of voluntarily causing hurt, under Section 323 of the Indian Penal Code, is one which may lawfully be compounded, and the withdrawal from the prosecution in such a case is, therefore, permissible under Section 188 of the Code of Criminal Procedure.

THIS was a reference made by T. C. Hope, Magistrate of the District of Surat, under Section 296 of the Code of Criminal Procedure. One Bhangio Ditio instituted a complaint against the accused Jethá Bhalá, in the court of the Third Class Magistrate of Mandvi, for voluntarily causing hurt, which complaint the Magistrate allowed to be withdrawn. The District Magistrate was of opinion that the Magistrate had no power to allow the complaint to be withdrawn, and, therefore, referred the case for the orders of the High Court.

The reference was heard by Melvill and Kemball, JJ.

PER CURIAM :—The offence of voluntarily causing hurt is one which may lawfully be compounded, and, therefore, withdrawal is permissible under Section 188 of the Code of Criminal Procedure.

Order accordingly.

[APPELLATE CRIMINAL JURISDICTION.]

Criminal Reference No. 23 of 1873.

REG. v. JAIMAL SHRA'VAN.

1873.
March 27.

Prevarication—Intentionally causing interruption to public servant—
Ind. Pen. Code, Sec. 228—Code of Criminal Procedure, Sec. 435.

Prevarication by a witness may, though it does not necessarily, amount to contempt of court within the meaning of Sec. 228 of the Indian Penal Code and Sec. 435 of the Code of Criminal Procedure.

THIS was a reference, under Section 296 of the Criminal Procedure Code, by G. A. Hobart, Session Judge of Khandesh, for the orders of the High Court.

The accused, Jaimal, was convicted by W. A. East, Magistrate 1st class, under Section 228 of the Indian Penal Code, of wasting the time of his court by prevaricating whilst giving evidence as a witness, and fined a sum of Rs.4. The Session Judge was of opinion that this conviction, under the ruling in *Reg. v. Aubá Bhivráv (a)*, was illegal and ought to be set aside.

The reference was heard by Melvill and Kembell, J.J.

PER CURIAM:—The Court is not prepared to hold, as a matter of law, that no amount of prevarication on the part of a witness will constitute the offence specified in Section 228 of the Indian Penal Code; nor does the Court think that the Judges, who decided the cases reported at pages 6 and 7 of Volume 4 of the Bombay High Court Reports, went so far as this. The head notes of those cases seem inaccurate. All that the decisions show, is that the finding of the Magistrate did not clearly specify that there had been an interruption. In other words, it was held, not that prevarication could not constitute an interruption, but that it was not necessarily an interruption. In the case of *Regina v. Abdul Rahiman* (see statement of Criminal Rulings, dated the 16th of March 1871) it was held that prevarication by a witness and refusal to answer a question might amount to intentional interruption within the meaning of Section 228 of the Indian Penal Code, and Section 163 of the old Code of Criminal Procedure.

(a) 4 Bom. H. C. Rep. Cr. Ca. 6.

Papers to be returned.

[APPELLATE CRIMINAL JURISDICTION.]

1873.
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Criminal Reference No. 20 of 1873.

REG. v. LA'LA' SHAMBHU.

Jurisdiction.—Crim. Proc. Code, Secs. 123, 127, and 141.—Police Report—Power of Third Class Magistrates to entertain charge on Police Report.

A Magistrate of the third class can try a person accused of a cognizable offence, who has been forwarded to him by an officer in charge of a police station, under Section 123 of the Code of Criminal Procedure.

THIS was a reference made, under Section 296 of the Code of Criminal Procedure, by A. A. Borradaile, Magistrate of the District of Ahmedabad, for the orders of the High Court. The accused was tried and convicted of the offence of theft by the third class Magistrate of Morásá, Mr. Harilál Sampatráam; but as he had proceeded with the case on a report from the Police, the District Magistrate considered that he had no jurisdiction.

The reference was heard by Melvill and Kemball, JJ.

PER CURIAM :—The question referred is whether a Magistrate of the third class can try a person accused of a cognizable offence, who has been forwarded by the Police under Section 123 of the Code of Criminal Procedure.

The Magistrate of the District is of opinion that the trial has been had without jurisdiction, because a Magistrate of the third class is not, and cannot be, invested with power to receive Police reports.

In this opinion the Court is unable to concur.

Section 20 of the Criminal Procedure Code, coupled with the schedule, gives a general jurisdiction to all Magistrates to try certain offences and pass certain sentences. Chapter X. empowers the Police to investigate certain offences, and to bring the accused, with all the necessary evidence, before the Magistrate (Section 123). Section 190 and subsequent sections provide for the trial by the Magistrate of persons so brought before him.

So far, there is nothing to indicate that the power of a Magistrate of the third class to try prisoners brought before him under Section 123 is in any way limited.

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But it is argued that his power is limited for the following reasons :—Section 127 requires the Police to submit a report to the Magistrate, when forwarding an accused person under Section 123 ; and Section 23 makes no such provision for investing Magistrates of the third class with power to receive Police reports, as is made in the case of Magistrates of the first and second classes by Sections 25 and 27.

But in construing the terms “ power to entertain complaints and receive Police reports ” in Section 21 and the similar expressions in Sections 23, 25, and 27, the Court must observe that the addition of the words “ Section 141 ” in brackets, shows that the Police reports referred to are only such reports as are indicated by Section 141. Now, Section 141 forms part of Part IV of the Code, which relates to proceedings to compel appearance, and a comparison of this section with those which precede and follow it seems clearly to indicate that the Police reports referred to are only those on which it may be necessary, or at least possible, to issue process. Thus Section 139 expressly excludes the consideration of cases in which the accused has been already arrested without warrant. Section 140 relates to the issue of a summons or warrant upon certain reports by the Police. Then follows Section 141 which authorizes certain Magistrates to entertain “ a complaint of an offence whether preferred directly by the complainant, or on report of a Police officer. ” These words clearly point to those reports, and those only, which operate as a complaint, or on which process is to be issued as on a complaint.

The report specified in Section 127 is merely descriptive, and requires no action to be taken upon it by the Magistrate. The Court does not think that it can be taken to be one of the reports specified in Section 141. The provisions of the new Code appear to the Court clearly to indicate the intention

1873. of the Legislature and to make the view expressed in *Reg. v. Jáfár Alí* (8 Bom. H. C. Rep. Cr. Ca. 113) no longer operative.
 REG. *v.*
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 SHAMBHU.

Any other construction of the Code than that which the Court now puts upon it would render Magistrates of the third class in this Presidency absolutely useless. The greater part of offences committed are investigated by the Police under Chapter X, and brought before the Magistrates under Section 123. It is quite intelligible that the Legislature may not have seen fit to entrust inexperienced magistrates with the delicate duty of making the preliminary investigation precedent to inquiry in Court ; but it is hardly to be believed that it was intended to debar any Magistrate from trying any case of petty theft or other similar offence which had been fully investigated and prepared by the Police.

The proceedings should be returned to the Magistrate, who should be informed that, in the opinion of the Court, the Magistrate, third class, had jurisdiction.

Order accordingly.

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 [APPELLATE CRIMINAL JURISDICTION.]
 Criminal Review No. 53 of 1873.

REG. v. NAVRANBEG DULA'BEG.

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False evidence—Jurisdiction—Contempt of Court—Crim. Proc. Code, Secs. 435, 436, 471, 472, and 473.

The offence of intentionally giving false evidence in a judicial proceeding cannot be tried by the Magistrate before whom the false evidence is given; this offence, being an attempt to pervert the proceedings of a Court to an improper end, is a contempt of its authority (Secs. 435, 436, 471, 472, and 473 of the Code of Criminal Procedure).

THE accused was convicted by W. R. Pratt, Magistrate F. C., at Ahmedabad, for intentionally giving false evidence before the Court of that officer, and sentenced to two years' rigorous imprisonment.

On examining the Criminal Returns of the Ahmedabad Magistrates for the month of January 1873, Melvill, J., directed the record and proceedings to be sent for, which having arrived, the case was heard by BAYLEY and WEST, JJ.

PER CURIAM:—The Court is of opinion that every attempt to pervert the proceedings of a court to an improper end is a contempt of its authority; and that giving false evidence is such an attempt. The offence, therefore, if committed before a Magistrate, cannot be tried by him. As such an offence is not in general exclusively triable by the Court of Session, it should, under Secs. 472 and 473 of the Code of Criminal Procedure, be sent for trial, if committed before the Court of Session, to a Magistrate. It is not likely, therefore, that it was intended that Magistrates should be able to try and convict in a similar case without the intervention of any other Court or authority. Under Sec. 297, therefore, the Court will annul the trial and order a new trial before a competent court, *i.e.*, either a First Class Magistrate or the Court of Session.

Proceedings annulled.

[APPELLATE CRIMINAL JURISDICTION.]

*Criminal Reference No. 53 of 1873.*1873.
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REG. v. MA'NSANG BHA'VSANG.

Ind. Pen. Code—Theft—Act XXXI. of 1850, Sec. 8.—Act XXVII. of 1837, Sec. 7.—Property in Salt naturally formed.

Dishonest removal of salt naturally formed in a creek, which was under the supervision of an officer belonging to the Customs Department, constitutes theft, the salt having been legally appropriated by such officer. (Per BAYLEY and WEST, JJ.)

But removal for one's own use from a creek, of such salt not legally appropriated, constitutes no offence either under the Indian Penal Code or Acts XXXI. of 1850 or XXVII. of 1837, though under Sec. 7 of the latter Act, made applicable by Sec. 8 of the former, the salt removed becomes liable to detention. (Per LLOYD and KEMBALL, JJ.)

THIS was a reference from G. W. Anderson, Magistrate in charge of the Collectorate of Broach, under Sec. 296 of the Code of Criminal Procedure.

The accused was convicted by Dámodardás Gokaldás, Second Class Magistrate of Wágrá, of the offence of theft, and sentenced to rigorous imprisonment for 20 days and a fine of Rs. 3, or in default to a further rigorous imprisonment for seven days.

Mr. Anderson, in referring the case, said: "From the evidence in this case it will be observed that the accused took away a *maund* of salt naturally formed in the creek of Gandhar, and which was under the supervision of a man belonging to the Customs Department, stationed there to prevent persons taking away salt naturally formed from sea water.

"As I entertain doubts after the ruling* of the High

* The ruling referred to by the Magistrate in charge of the District of Broach was made by LLOYD and KEMBALL, JJ., in the case of *Reg. v. Fakirā Khandia et. al.* and is as follows:—

"Removal for one's own use of salt from the bed of a creek not forming part of any salt work, constitutes no offence, either under the Indian Penal Code, or Acts XXXI. of 1850 or XXVII. of 1837, though under Sec. 7 of the latter Act made applicable by Sec. 8 of the former, the salt removed becomes liable to detention."

Court by the Honourable LLOYD and KEMBALL, JJ., on the 12th September 1872, whether the accused has committed an offence, I forward the proceedings for the orders of the Judges of the said Court."

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The reference was heard by BAYLEY and WEST, JJ.

PER CURIAM :—The Court will not interfere, as the salt having in this case been legally appropriated, its dishonest removal was theft.

Record and Proceedings returned.

[ORIGINAL CRIMINAL JURISDICTION.]

REG. v. PESTANJI DINSHA' AND ANOTHER.

Statement of Judge conclusive—Refusal of Judge to reserve point of law not reviewable—Summing up by judge—Non-direction—Certificate by Advocate General—Abetment of murder by impossible means—Sorcery—Privy Council—Leave to appeal.

The statement of a Judge, who presides at a criminal trial, is, upon a case reserved under the 25th clause of the Charter of the High Court, or upon a case certified by the Advocate General under its 26th clause, conclusive as to what has passed at the trial. Neither the affidavits of bystanders or of jurors nor the notes of counsel or of short-hand-writers are admissible to controvert the statement of the Judge.

It is in the discretion of the Judge, who presides at a criminal trial, whether or not he will reserve a point of law for the opinion of the High Court, and such discretion will not be reviewed by the High Court sitting as a court of review, under clause 26 of the Letters Patent.

Semble. Non-direction by a Judge is not a matter upon which the Advocate General should grant a certificate under clause 26 of the Letters Patent.

In considering whether a Judge has misdirected the jury, the tenor and general effect of the whole summing up should be looked at, and if, upon the whole summing up, the court is of opinion that substantially the proper direction has been given to the jury, it will not interfere, though the Judge has omitted to direct the jury expressly on some important point.

1873. Whether abetment to murder by sorcery or other impossible means
 REG. is an offence under the Penal Code.—*Quære.*
 v. In criminal cases the High Court will not, in general, grant leave to
 PESTANJI appeal to the Privy Council, unless some important question of law
 DINSHA'. or practice, or jurisdiction is involved.

Considerations that guide the Court in granting leave to appeal in such cases, stated, and instances in which such leave has been granted, mentioned.

AT the First Criminal Sessions of 1873, before BAYLEY, J., and a Special Jury, Pestanji Dinshá and Sakhárám Rághobá were charged as follows:—

I. That they, the said P. D. and S. R., heretofore to wit on the 11th of December 1872 at Bombay, did instigate one Kakishá Illáhibaksha to murder one Nicholas DeGa, and did thereby abet the commission of an offence punishable with death against the Acts, &c.

II. That they, the said P. D. and S. R., afterwards to wit on the day and year last aforesaid, did instigate one Kakishá Illáhibaksha to murder one Rose Mary DeGa, &c., (following the wording of the former charge).

The evidence given at the trial, which consisted of that of persons who overheard the conversation, showed that Pestanji Dinshá and his accomplice Sakhárám Rághobá instigated Kakishá Illáhibaksha to kill the two DeGas, named in the charges, but that when speaking to Kakishá Illáhibaksha, with reference to the means by which the deaths were to be brought about, Pestanji Dinshá expressly told Kakishá that he was not to use poison but was to "polish off" (*sáf karná*) the DeGas by means of *illum*. Kakishá Illáhibaksha, the person instigated, was, at the time of the instigation, in the employment of the Police.

It was contended for the prisoners at the trial: I—that the intention of the prisoners was not a serious intention to kill, and II—that if, in fact, such an intention did exist in their minds, it was clear, upon the evidence, that their intention was that the deaths should be brought about by means of sorcery only, and that instigation to murder by sorcery did not constitute the offence of abetment of murder within the meaning of the Penal Code.

Anstey and *Inverarity* were of counsel for the prisoner Pestanji Dinshá.

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Marriott and *B. Tyebji* were of counsel for the prisoner Sakhárám Rághobá.

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The Honourable *A. R. Scoble* (Advocate General) and *Ferguson* appeared for the prosecution.

Anstey, before addressing the jury for the first prisoner, asked the presiding Judge to rule that there was no case to go to the jury, but the learned Judge held that there certainly was a case to go to the jury, and *Anstey*, thereupon, addressed the jury both on the law and the facts.

At the close of *Anstey's* address, his junior counsel, by his direction, asked the learned Judge to reserve, under clause 25 of the Letters Patent, for the opinion of the High Court, the point of law "whether instigation to murder by sorcery constituted any offence at law," but the learned Judge declined to do so, saying that he did not think there was at present (then) any question of law to be reserved.

The further material incidents that occurred at the trial are fully detailed in the judgment of the Full Court.

The jury found the prisoners guilty, and they were each sentenced to seven years' rigorous imprisonment.

Subsequently, upon a certificate of the prisoners' counsel as to the direction given by the learned Judge in his charge to the jury, the Advocate General granted a certificate, under clause 26 of the Letters Patent, which, omitting the formal portions, ran as follows:—

"And whereas the said Pestanji Dinshá and Sakhárám Rághobá were respectively found guilty by the said jury upon the said charges and were, therefore, severally sentenced, by the said Mr. Justice BAYLEY, to rigorous imprisonment for the term of seven years; and whereas it has been represented to me that the said Justice did direct the said jury with regard to the said charges that evidence of a simple intention to kill, without reference to the means to be employed to cause death, was sufficient in law to warrant the conviction of the said Pestanji Dinshá and Sakhárám Rághobá upon the said charges; and whereas it may be doubtful whether the said direction of the said

1873. Justice to the said jury is warranted in law, NOW I, Andrew Richard Scoble, Her Majesty's Advocate General at Bombay, do, under and by virtue of the powers to me entrusted by the Letters Patent for the High Court of Judicature for the Presidency of Bombay, bearing date the 28th of December 1865, hereby certify that in my judgment the said point of law, so alleged to have been decided by the said Mr. Justice BAYLEY, namely, that evidence of a simple intention to kill, without reference to the means to be employed to cause death, is sufficient in law to warrant a conviction of abetment of murder, should be further considered by the High Court."

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The case came on for argument before a Full Court consisting of WESTROPP, C. J., GIBBS, SARGENT, BAYLEY, and MELVILL, JJ., on the 11th day of March 1873.

The Honourable A. R. Scoble (with him *Ferguson*), in support of the conviction, stated that though, on the representation of counsel for the prisoners, he had, as Advocate General, given the above certificate, he did not admit as a fact that such a direction, as was therein alleged to have been given, had in fact been given. [BAYLEY, J., said that he had not given such a direction to the jury]. The Judge's statement is conclusive: *Gibbs v. Pike* (a). [WESTROPP, C.J., referred to *R. v. Grant* (b). and *Everett v. Yoellus* (bb).]

The Court then suggested that the certificate might be amended by the Advocate General so as to make it represent what actually took place at the trial. The Advocate General assented to this being done, and an amended certificate was then drawn up. It is set out in the judgment of the Court.

Anstey and *Inverarity*, for Pestanji Dinshá, argued that abetment of murder by sorcery was not an offence under the Penal Code, and cited *R. v. Cassidy* (c), *In re Jotee Ghorae* (d), Notes to Mayne's Penal Code under Sec. 511, *R. v. Isaacs* (e), *R. v. Scuddler* (f), and referred to Section 108 of the Penal Code 2nd Explanation.

(a) 9 M. & W. 351. (b) 3 N. & M. 106. 5 B. & Ad. 1081.

(bb) 4. B. & Ad. 681, 683.

(c) 4 Bom. H. C. Rep. 17. Cr. Ca. (d) 1 Calc. W. Rep. Cr. R. 7.

(e) 9 Jur. N. S. 212. S. C. 32 L. J. Mag. Ca. 52. (f) 3 Car. & P. 605.

Assuming that there cannot be an abetment to murder by sorcery, then we contend that, under the circumstances, the refusal of the Judge to reserve the point of law, coupled with his omission to tell the jury that instigation to murder by sorcery was not an offence, and with his saying, in the presence of the jury, that there was no point of law to be reserved, might have led the jurors to believe that abetment to murder by sorcery was an offence. The conduct of the Judge, under these circumstances, amounted to a misdirection: *Queen v. Nawab Jan (g)*, *Queen v. Elahee Buksh (h)*. [BAYLEY. J.—Is non-direction a matter for a bill of exceptions? *M'Alpine v. Mangnall (i)*, *Anderson v. Fitzgerald (j)*.] No. That is the rule in civil cases; but there another remedy is provided—a new trial can be moved for. On the point of non-direction see also *Elliott v. South Devon Railway Co. (k)*; *Gregory v. Tuffs (l)* and *Goldicut v. Beagin (m)*. In fact there has been a mistrial, and this court will, upon that fact, being shown, set aside the conviction and sentence: *Reg. v. Aaron Mellor (n)*. The tendency of the whole evidence goes to show that the prisoners intended to kill by sorcery only, but it is sufficient for us to show that there is evidence to that effect.

We contend that the charges are bad for not stating that the offence, which the prisoners were charged with abetting, was not committed. This court can now take cognizance of that objection: *R. v. Webb. (o)*. We say this Court has no power to do otherwise than quash the conviction. It has no power to grant a new trial in cases of felony: *Queen v. Bertrand (p)*, *Queen v. Murphy (q)*. This is a new offence created by the Penal Code and is substantially a felony—see *Queen v. Mellor (supra)*, *Queen v. Martin (r)*.

Marriott and B. Tyebji followed for Sakháram Rághobá.

(g) 8 Calc. W. R. Cr. R. 19. (h) 5 Ibid 80. (i) 3 C. B. 496.
 (j) 4 H. L. Cas. 484. (k) 2 Ex. 725. (l) 1 C. M. and R. 310.
 (m) 11 Jur. 544. (n) 1 Dears. & B. 468. See Per Coleridge pp. 490, 491.
 (o) M. & Rob. 405.
 (p) L. Rep. 1 P. C. C. 520. (q) 2 Ibid. 35, 535. (r) L. R. 1 Cr. Ca. 378.

1873. *Scoble* in reply :—It was in the discretion of the Judge
 REG. whether or not he would reserve a point of law and that
 v. discretion cannot be reviewed: *Newton's Case* (s), *R. v.*
 PESTANJI *Charlesworth* (t), *R. v. Webb* (supra), *Queen v. Stubbs* (u),
 DINSHA'. *Winsor v. Queen* (v), *Reg. v. Dáyal Jáiráj* (w), and judgment
 of Crampton in *Conway and Lynch v. Queen* (x).

An omission to direct is not a misdirection: *Anderson v. Fitzgerald* (supra). The whole summing up must be looked at, and the court must see what its general effect is: *R. v. Russell* (y). The whole tenor of the summing up of BAYLEY, J., as appears from the statement that the judge has drawn up (and which must be deemed to be correct: *R. v. Mellor*), was to point out to the jury that in his opinion abetment of murder by sorcery was not an offence, and that the prisoners intended to kill by means other than supernatural. I contend, in any case, that non-direction is not matter for the granting of a certificate under clause 26 of the Letters Patent. There must be some point of law decided. The cases cited from the Calcutta High Court have no application. They were decided upon the Criminal Procedure Code which does not apply to trials by jury in the High Court.

He also cited *R. v. Higgins* (a), *Queen v. M'Pherson* (b), and distinguished the cases cited on the other side. He also contended that abetment to murder by sorcery was an offence, inasmuch as death might be caused by sorcery indirectly, and that, even if that were not so, intention to kill, followed by an overt act of instigation, constituted an abetment of murder, under Sec. 109 of the Penal Code.

Anstey was heard upon the new cases cited. He argued that killing caused by indirect means was not an offence, and referred to *R. v. Martin* cited at page 674 of *Russell on Crimes*.

(s) 13 Q. B. 716. (t) 31 L. J. Mag. Ca. 25 (u) 1 Jur. N. S. 1115.
 (v) L. R. 1 Q. B. 289, 390. (w) 3 Bom. H. C. Rep. Cr. Ca. 20. (x) 7 Ir.
 L. R. 149, 165. (y) 6 B. & Cr. 566. (a) 2 East 5. (b) 1 D. & B. 197.

On the 24th of March, the judgment of the Court was delivered by—

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WESTROPP, C. J., (who, after reading the charges and the original certificate of the Advocate General, proceeded):—

The representation on which that certificate was given, was contained in the concluding passage in a certificate of counsel for the prisoners, which appears to have contained other matters, with reference to which, however, the Advocate General has not certified any point for the consideration of this court. With those matters, therefore, we are not concerned. It will be observed that the Advocate General was careful, in the manner in which he worded his certificate, not to bind himself to the accuracy of the representation made to him, that the Judge did direct the jury that evidence of a simple intention to kill, without reference to the means to be employed to cause death, was sufficient in law to warrant the conviction of Pestanji Dinshá and Sakhárám Rághobá upon the charges. The learned Advocate General, in opening the case to this court, informed us that he did not understand the learned Judge to have given any such direction to the jury. The learned Judge also positively states to us that he did not so instruct the jury; and in the summary (which he has furnished to us and to the learned counsel at both sides) of the remarks upon the case which he did address to the jury, there is not a trace of any such direction. The statement of the Judge, who presides at a trial, whether it be in a criminal or civil case, is, as to what has taken place at the trial, conclusive. Neither the affidavits of bystanders, nor of jurors, nor the notes of counsel, nor of short-hand writers are admissible to controvert the notes or statement of the Judge: *Rex v. Grant* (c), *Everett v. Youells* (d), *Gibbs v. Pike* (e). And in *Reg. v. Aaron Mellor* (f), Coleridge J., at page 131, says: "I apprehend that we are bound to give credence to the statement of the Judge, and to take what the Judge so

(c) 5 B. & Ad. 1081, 1807; S. C. 3 Ne. & M. 106.

(d) 4 B. & Ad. 683, 684. (e) 9 M. & W. 351.

(f) 27 L. J. N. S. 121. Mag. Ca.

1873. states to be incontrovertibly the fact. It is suggested this is not a record, but we have no more power of contradicting the statement of a learned Judge reserved for our consideration, than we have the power of contradicting any allegation upon a record"; and Martin B. (p. 137) says: "We must consider the statement of the Judge as absolute verity, and we ought to take his statement precisely as a record, and act on it in the same manner as on a record of court, which of itself imports absolute verity." The learned Judge informs us that what occurred was this:— At the close of the case for the prosecution, Mr. Anstey, for the defence, asked the learned Judge whether, in his opinion, there was any case to go to the jury; and he replied that he thought that there certainly was. Thereupon, Mr. Anstey, on behalf of the prisoner Pestanji Dinshá, addressed the jury upon the law and the facts, and, in the course of that address, contended that there was not any evidence of an instigation to murder in any other manner than by sorcery, witchcraft, or other supernatural means; and that such an instigation was not an abetment within the Penal Code, inasmuch as it was impossible to perpetrate murder by any such means. Subsequently, but before the learned Judge addressed the jury, Mr. Inverarity, who was junior counsel with Mr. Anstey, and in his temporary absence, asked the Judge to reserve, under the 25th clause of the Letters Patent of 1865, as a point for the determination of the Full Court, the question "Whether instigation to murder by sorcery constituted any offence at law?" and the learned Judge declined to do so, saying that he did not think that there was at present (then) any question of law to be reserved. Mr. Marriott, who was of counsel with Mr. Badrudin Tyabji for Sakhárám Rághobá, in addressing the jury, also contended that the instigation to murder by supernatural means alone could not constitute any offence within the Penal Code, and that the evidence did not show an instigation to murder by any other means, and expressed to the jury a hope that the learned Judge would put three questions to the jury:—1.— Whether there was a real intention that the DeGas should be murdered? 2.— Whether that intention was that they should

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be murdered by supernatural means? 3.—Whether it was intended by the prisoners that the murder should be by any material means? The learned Judge, at the close of Mr. Marriott's address, charged the jury. We shall presently refer to what he said. The jury returned a verdict of guilty against both prisoners. Mr. Marriott then moved in arrest of judgment on the ground that both counts in the indictment (or rather charges, as they have been styled since Act. XIII. of 1865 which abolished grand juries in the Presidency towns), were insufficient in law, because it was not alleged in them that the offence, namely, the murder, alleged to have been abetted, was not committed. The learned Judge refused to arrest the judgment, and then passed sentence upon the prisoners. The representation on which the Advocate General's certificate was grounded, that the Judge had instructed the jury that evidence of a simple intention to kill, without reference to the means to be employed, was sufficient in law to warrant a conviction, being, as, on the information of the learned Judge, we were bound to assume, contrary to the fact, and the certificate of the Advocate General, therefore, unsustainable in fact, the case must have ended there, had not the Advocate General, on the suggestion of the Court, amended his certificate so as to render it more conformable to the circumstances of the case as stated by the learned Judge. We must not for a moment be understood as impeaching the *bona fides* of the counsel for the prisoners in certifying, as they did, to the Advocate General. Three of those learned counsel were present when the Judge summed up, Mr. Anstey being absent. Nothing is more common than for men honestly to differ in their recollections as to what occurs in court or at a public or private meeting. We had not long ago a striking specimen of such discrepancies in the suit of *The Bank of Bombay v. The Oriental Bank*, in which men of undeniable honour and veracity gave widely varying narratives of the proceedings at the meeting at which a loan of 25 lakhs was agreed to be made to Prem-

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DINSHA'. chand Ráichand. The law has made the Judge the final authority as to what takes place before him at a trial ; and that authority this Court must recognize. The Court, however, thought it desirable and suggested to the learned Advocate General that he should amend his certificate, in order that such of the facts, stated by the learned Judge to have occurred, as it was alleged on behalf of the prisoners amounted to a misdirection on the part of the Judge to the jury, should be brought before this Court. Where points of law are reserved under the English Statute 11 & 12 Vict. ch. 78, the Court for Crown Cases Reserved expects the cases to be submitted in a complete form, and will ordinarily refuse to send back a case to the Judge who reserved the points for amendment: *Reg. v. Holloway (g)*. Sometimes, however, it will do so, not on the application of counsel, but if, on the argument, the case appears to have been imperfectly stated: *Reg. v. Hilton (h)*. If counsel should think that a material point has been omitted, it has been considered to have been proper for him to communicate with the Judge who reserved the case, and suggest any amendment that, in his opinion, may be necessary: *Reg. v. Smith (i)*. The Advocate General gracefully and promptly yielded to the suggestion ; for it was no more, of this court, which had neither the intention nor the right to dictate to him in the matter. (See the remarks of Sir Richard Couch in *Reg. v. Dayal Jairaj (j)*). And in making that suggestion we did not commit ourselves to any final expression of opinion as to whether it would be possible, consistently with the actual circumstances of the case, for the Advocate General so to amend his certificate as to satisfy the requirements of the 26th clause of the Letters Patent of 1865.

The certificate of the Advocate General, as amended, after stating the charges, conviction, and sentences, as before, proceeds as follows :—" And whereas *it has been represented to*

(g) 1 Denison C. C. 370.

(h) Bell C. C. 20. (i) 14 Jur. 92 : 4 Cox. C. C. 42 ; 1 Den. C. C. 570.

(j) 3 Bom. H. C. Rep. Cr. Ca. 22.

me that the said Justice did, in the presence and hearing of the jury, refuse to reserve, for the opinion of the said High Court, the point of law following, that is to say, 'whether instigation to murder by means of sorcery is an offence or not,' and did not instruct the jury, in his summing up, that instigation to murder by means of sorcery was not an offence, but, on the contrary, did tell the jury and did say, in their presence and hearing, that there was no point of law in the case to be reserved for the opinion of the said High Court; and whereas *it has been further represented to me*, on behalf of the said Pestanji Dinshá and Sakáram Rághobá that the said rulings and proceedings of the said Justice constitute error in the decision of a point or points of law; and whereas, in my judgment, it is desirable that the point or points of law *so alleged* to have been decided by the said Justice should be further considered:—Now I, Andrew Richard Scoble, Her Majesty's Advocate General at Bombay, do under and by virtue of the powers to me entrusted by the Letters Patent for the High Court of Judicature for the Presidency of Bombay, bearing date the twenty-eighth day of December, one thousand eight hundred and sixty-five, hereby certify that in my judgment the said point or points of law, so alleged to have been decided by the said Justice, should be further considered by the High Court."

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The allegation, in that certificate, that the Judge, in the presence and hearing of the jury, refused to reserve the point of law therein mentioned, most certainly when taken alone, states no error in law. It was rightly argued for the Crown that it was completely a matter of discretion with the learned Judge whether he should reserve for this Court any point of law. The 25th clause of the Letters Patent of 1865 is this: "And we do further ordain that there shall be no appeal to the said High Court of Judicature at Bombay from any sentence or order passed or made in any criminal trial before the court of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such court to reserve any point or points of law for the opinion of the said High

1873. Court." The exercise of the discretion of the Judge is not
 REG. a matter reviewable under Clause 26 of the Letters Patent :
 v. *Reg. v. Dayál Jairáj (k)*, per Couch, C.J. The certificate then
 PESTANJI continues to state, as represented to the Advocate General,
 DINSHA'. that the Judge "did not instruct the jury, in his summing up,
 that instigation to murder by means of sorcery was not an
 offence, but, on the contrary, did tell the jury and did say, in
 their presence and hearing; that there was no point of law in
 the case to be reserved for the opinion of the said High
 Court." The first part of this allegation, viz., that the
 Judge "did not instruct," &c., is an averment of an omis-
 sion, and no more, on the part of the learned Judge. It simply
 puts forth a non-direction by him, not a misdirection. Here
 it will be proper to refer to some of the principal authorities
 relating to this point. They are for the most part cases
 decided on bills of exceptions. It is true that a bill of excep-
 tions will not lie in any criminal case, whether of felony or
 of misdemeanour. This is because civil causes only are
 within the Statute of Westminster the 2nd : *In re Hayes and
 Rice (l)*, *Sir Harry Vane's case (m)*, *Reg. v. McDonnell
 (n)*, *Reg. v. Alleyne (o)*, *Reg. v. Esdaile (p)*, and 3 Russ.
 Cr. L. by Greaves, p. 212. If, in England, the Judge who
 presided at the trial was of opinion that an illegality had
 occurred in it, he might formally, in his discretion, forbear
 to pass sentence or respite the judgment, until the opinions
 of the fifteen Judges were obtained. For this course was
 substituted the right to reserve questions of law under the
 Stat. 11 & 12 Vict. ch. 78, which, to a considerable extent,
 resembles the provision made in the 25th clause of the
 Letters Patent, which has been already mentioned. To the
 26th clause, empowering the Advocate General to certify a
 question of law, there is not any corresponding section in
 the Stat. 11 & 12 Vict. ch. 78. The power under the Stat.
 11 & 12 Vict. ch. 78, and under the Letters Patent, to

(k) 3 Bom. H. C. Rep. Cr. Ca. 28. (l) 3 Jo. and Lat. 568.

(m) 2 Harg. State Trials 450.

(n) Hud. and Br. 439.

(o) Dearsley C. C. 505. 509; S. C. 1 Jur. N. S. 373. (p) 1 F. and F. 214.

reserve questions of law, is, in criminal cases, to a considerable extent analogous to the mode of raising questions of law in civil causes by a bill of exceptions. In *M'Alpine v. Mangnall* (q), counsel for the defendants in error said that the bill of exceptions did not, as it ought to do, show how the Lord Chief Justice did direct the jury; it merely stated that he declined to direct them in a particular way. And counsel for the plaintiff in error, in reply, said that a refusal on the part of a Judge to direct in a way in which he is bound in point of law to direct, is a misdirection. But Baron Parke said: "That which you complain of here is a non-direction, which clearly cannot be made the subject of a bill of exceptions," and, finally, in giving judgment, said: "It is misdirection, and not non-direction, that is the proper subject of a bill of exceptions." In *Anderson v. Fitzgerald* (r), Mr. Baron Parke, in giving the unanimous opinion of the English Judges, said: "With respect to the second question proposed by your Lordships, we answer, that the exceptions, on the issue joined on the second and third pleas, are not sustained, and that on a formal ground. The bill of exceptions should have stated what directions the Judge gave, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions." In *Gregory v. Cotterell* (s), the third exception was "that evidence of the practice at the offices of the sheriff's officers and of the officers' clerks ought not to have been admitted, and that the Judge ought to have directed the jury to disregard it," and it was held "that evidence of the practice at the office of the sheriff's officer was admissible; and that the exception was defective, inasmuch as misdirection, and not non-direction, was the proper subject of a bill of exceptions." Jervis, C. J., after observing that evidence of the practice was constantly received as against the sheriff, said: "But the best answer to that objection is that the form in which it is pleaded and presented to the Court is a defective form, because it has been held (*M'Alpine v. Mangnall*, in error 3 C. B. 496, and *Anderson v. Fitzgerald*, 4 H. L. C. 484, 17

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(q) 3 C. B. Rep. 496.

(r) 4 Ho. Lda. Cases 484.

(s) Exchequer Chamber in Error from the Court of Q. B. 2 Jurist N. S. 16

1873. Jur. 995) that the exception must not take an objection to the Judge not doing what he ought to have done, but must object to some positive act which he did." In *Jefferys v. Boosey* (t) Lord Chief Justice Jervis said : " The party who excepts to the ruling of a learned Judge must show clearly, upon his bill, that the learned Judge was wrong. Every fair intendment must be made in favour of the summing up, and if, therefore, it is not apparent upon the record that the direction was wrong, the verdict must stand." In *Sedly v. M'Gowan* (u), Crampton J. says : " But, secondly, was the Judge bound to direct the jury in the terms required by the defendant's counsel ? I think not. In my apprehension, an exception lies to any rule made by the Judge at the trial, or to what a Judge says in his charge, or any part of it, but not to what he does not say or refuses to say. A Judge is not by law compelled to charge at all, though in many (indeed in most) cases it would be right and expedient so to do. The exception should be for *mis-direction* not for *non-direction*. * * * Upon this ground merely, therefore, the first exception in this case should be overruled."

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On motions for new trials, where the question whether a verdict is against the weight of evidence may be raised, the Court gives more consideration to the point whether a Judge has omitted to give a proper direction to the jury than upon a bill of exceptions. It would appear to be " a good ground for a new trial that a direction has been left so bare as to require an explanation, to prevent the probability of its being misunderstood." But, even on motion for a new trial, non-direction is only a ground for granting a new trial, where the verdict is against the weight of evidence : *Ford v. Lacy* (v), *The Great Western Railway of Canada v. Braid* (w). See also *Gregory v. Tuffs* (x), *Elliott v. The South Devon Railway Company* (y). And in *The D. of Newcastle v. Broxtowe* (z), it was said, on a motion for a new trial, in a case of alleged

(t) 4 H. of L. Cases 941.

(u) 7 Ir. C. L. Rep. 434.

(v) 30 L. J. N. S. 351 Exch.

(w) 1 Moo. P. C. C. N. S. 101, 122

(x) 1 Cr. M. and R. 310.

(y) 2 Exch 725,

(z) 4 B. & Ad. 280.

misdirection, that it is only in those cases in which the Court is satisfied that the jury has been led to a wrong conclusion that it ought to interfere. The same doctrine has been frequently laid down. What the Court looks to is whether "complete and substantial justice has been done; if so, there is no reason to grant a new trial" (a). These, it is true, were all civil cases, but the principle is equally sound in criminal cases. In *Reg. v. Russell* (b), which was a motion for a new trial in a criminal case, Crompton, J., said: "It is dangerous to pick out particular expressions from a Judge's summing up and to criticise them verbally, when he is substantially correct in the direction he gives the jury." Proceedings under the 25th and 26th clauses of the Letters Patent of this Court, or under the Stat. 11 & 12 Vict. ch. 78. in England, bear a much closer analogy to a proceeding upon a bill of exceptions than to a motion for a new trial, and the Court is much more limited in its action than it would be in a motion for a new trial, where the question, whether a verdict has been against the weight of evidence, may be entertained. In cases under the Stat. 11 & 12 Vict. ch. 78, the Court will not consider an objection which has not been reserved, even though it may be deducible from the case itself: *Reg. v. Smith* (c). The case of *Reg. v. Elahoe Buksh* (d), followed in *Reg. v. Nawab Jan* (e), was much relied upon by the counsel for the defence as showing that an omission to direct will be treated as an actual misdirection. But, for that purpose, those cases are not in point upon questions reserved by a Judge or certified by the Advocate General at the Original Jurisdiction Side of the High Court, where the procedure in criminal cases is not regulated by the Criminal Procedure Code, but, in the main, by the English practice as it existed in the Supreme Court, save where altered by special legislation, or by the Charter of

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(a) 2 Term Rep. 4; 2 Bing. 483 and per Burrough J. 495; 1 B. & Ad. 145; 6 Exch. 213; 12 C. B. N. S. 776; 11 M & W. 401; 16 C. B. 227.

(b) 23 L. J. N. S. 173, 177 Mag. Ca.

(c) 14 Jur. 92.

(d) 5 Calc. W. Rep. Cr. R. 80.

(e) 8 Ibid 19.

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Inverarity on behalf of Pestanji Dinshá and *Marriott* on behalf of Sakhárám Rághobá moved, before a Court composed of the same Judges as above, on the 7th April for leave for the prisoners to appeal from their respective convictions and sentences to the Privy Council, and also from the judgment of the Court in the point of law certified by the Advocate General.

WESTROFF, C.J. :—We willingly accept the passage quoted to us by Mr. Marriott, on behalf of the prisoners, from the judgment of the Privy Council, delivered by Sir John T. Coleridge, in *The Queen v. Bertrand (f)*, as correctly laying down, so far as it extends, the grounds upon which leave to appeal against a decision in a criminal case ought to be granted. He said—"It is not necessary, and perhaps it would not be wise, to attempt to point out all the grounds which may be available for the purpose; but it may safely be said, that when the suggestions, if true, raise questions of great and general importance, and likely to occur often, and also where, if true, they show the due and orderly administration of the law interrupted, or diverted into a new course, which might create a precedent for the future; and also where there is no other means of preventing these consequences, then it will be proper * * * to entertain an appeal." In that case an innovation of great importance had been made in a colonial court—a new trial had (at the instance of the accused, who had been convicted of murder,) been granted in a case of felony, and for such a course there was only one solitary precedent—*The Queen v. Scaife (g)*, of which Sir J. T. Coleridge, expressing the opinion of the Privy Council, spoke as a "decision which has taken no root in our law, and borne no fruit in our practice." We altogether fail to perceive in the present case any "question of great or general importance and likely to occur often" and showing "the due and orderly administration of the law interrupted or diverted into a new course which might create a precedent for the future, and where there is no other means of preventing these conse-

(f) L. Rep. 1 P. C. 530.

(g) 17 Q. B. 238.

quences." If we were of opinion that anything had occurred which prevented the accused persons from having a fair trial, as, for instance, that they had been probably prejudiced by an omission on the part of the learned Judge who presided at the trial to give a proper direction to the jury whereby the jury may have been misled; and were further of opinion that under Sec. 26 of the Letters Patent of 1865 we could not interfere with the conviction, we would recommend the prisoners to the favourable consideration of Government, and would not subject them to the expense and delay of an appeal to the Privy Council, and we have no doubt that our recommendation would, under such circumstances, receive due attention. But as we were of opinion that the charge of the Judge to the jury clearly implied that the law was, as the prisoners' counsel contended it to be, viz., that it was necessary that an instigation to murder by means other than sorcery was necessary in order to constitute an abetment to murder within the Penal Code, we saw no reason to suppose that the prisoners had been prejudiced, or that the jury could have been misled in the sense placed on that word by the counsel for the defence. We do not think that this case at all approaches in importance any of those cases in which leave to appeal to the Privy Council has been heretofore granted by the Courts in India established by Royal Charter. There are only three such cases known to us, viz., 1.—*Pooneakhoty Moodeliar v. The King (h)*, where there was a plea, in the year 1816, denying the jurisdiction of the Recorder's Court in Bombay over the accused, who stood charged with uttering a forged receipt for money with intent to defraud the East India Company in camp at Serroor in the Deccan, then part of the dominions of the Peishwa. The prisoner was a native of Arcot, but, at the time of the offence, was serving in the Bombay Army at Serroor. 2.—*Aga Kurboolie Mahomed v. The Queen (i)*, where there was a difference of opinion amongst the Judges of the Supreme Court at Calcutta as to whether a new trial should in that case (a misde-

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(A) 3 Knapp 348. (i) 4 Moo. P. C. C. 239.

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meanour) be granted or not. The third case was *Nga Hoong and others v. The Queen (j)*, where there was a very important question as to whether a murder committed upon an island in the Bay of Bengal, which at high tide was covered with water, fell within the jurisdiction of the Supreme Court at Calcutta, Colvill, C.J., and Buller, J., holding that it did, and Jackson, J., holding that it did not. The Privy Council agreed with the latter, and quashed the capital conviction had in that case. It appears, then, that in those cases in which leave to appeal was granted, there was either a difference of opinion amongst the Judges, or an important question of jurisdiction, or both. On the other hand, in some cases of much greater importance than the present case, leave to appeal has been refused. In *Reg. v. Eduljee Byramjee and others (k)*, where one of the prisoners was sentenced to death and the others to transportation for life for murder, the Supreme Court of Bombay refused leave to appeal to the Privy Council. It was contended in that case for the prisoners that there had been misdirection by the Judge, and a verdict by the jury against the weight of evidence. In *Reg. v. Alloo Paroo, and others (l)*, which was a case of transportation for life for destroying a ship, the same Court refused leave to appeal, although there was an important point of law in the case. In those two cases (especially *Reg. v. Eduljee Byramjee and others*) when unsuccessful attempts were made to obtain from the Privy Council the permission to appeal which had been refused by the Supreme Court of Bombay, and in *Reg. v. Bertrand (m)*, it is manifest that their Lordships of the Judicial Committee were of opinion that "interference by Her Majesty in Council in criminal cases is likely in so many instances to lead to mischief and inconvenience, that in them the Crown will be very slow to entertain an appeal by its officers on behalf of itself, or by individuals. The instances of such appeals being entertained are

(j) 7 Moo. Ind. App. 72; 1 Boulnois Rep. 189, 281.

(k) 5 Moo. P. C. C. 276. S. C. 3 Moo. Ind. App. 468.

(l) 5 Moo. P. C. C. 296; S. C. 3 Moo. Ind. App. 488; Perry Or. Ca. 551.

(m) L. Rep. 1 P. C. 530.

therefore very rare," and Sir J. T. Coleridge referred to three cases as establishing those opinions—*In re Ames and others* (n), *Reg. v. Joykissen Mookerjee* (o), and *The Falkland Island Company v. the Queen* (p). In the present case there has neither been any difference of opinion amongst the Judges who compose this Court, nor any question of jurisdiction, nor has there been decided in it any other question of great or general importance, which would justify us in sending such a case as this any further. The authorities, to which we have referred, satisfy us that, if we were to grant permission to appeal to Her Majesty in Council on the present occasion, we should exceed our duty.

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Leave to appeal refused.

[APPELLATE CIVIL JURISDICTION.]

Cross Special Appeals Nos. 175 and 223 of 1872.

No. 175.

RANCHHOD JAMNA'DA'S *Appellant.*

January 27.

LALLU HARIBHA'I *Respondent.*

No. 223.

LALLU HARIBHA'I *Appellant.*

RANCHHOD JAMNA'DA'S *Respondent.*

Breach of Contract—Relief—Mandatory Injunction—Damages.

Where the plaintiff and the defendant, being owners respectively of two adjoining houses and the verandahs immediately in front of those houses, agreed that they should keep the verandahs open and not build upon them or divide them by a wall :—

(n) 3 Moo. P. C. C. 409.

(o) 1 Moo. P. C. C. N. S. 272. (p) 1 Ibid 299.

1873. *Held* that the mere fact that the defendant, when re-building his house, built its new front wall in advance of the plaintiff's, thus encroaching on the defendant's own verandah in breach of the agreement, is not sufficient in itself to justify the Court in granting a mandatory injunction ordering its removal. It should also be satisfied that the new wall so materially interferes with the comfort and convenience of the plaintiff, that the consequences of the breach of agreement cannot adequately be compensated by damages. It should also satisfy itself whether the plaintiff protested against the new wall being built, whilst in course of erection, or quietly acquiesced in what the defendant was doing, and only objected when the wall was completed. In the latter case the Court should only award damages.

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THESE were cross special appeals from the decision of E. Hosking, Acting Extra Assistant Judge at Ahmedabad, amending the decree of the Second Class Subordinate Judge Neriad.

The facts of the case, in so far as they are material, are shortly as follows :—

The plaintiff and the defendant were owners of two adjoining houses which had verandahs in front of them. They agreed by an instrument in writing not to build upon their verandahs or to divide them by a wall. The defendant having occasion to rebuild his house, built his front wall 18 inches in advance of the plaintiff's, so as to encroach upon a part of his verandah; and he also built a "pallee," a little ridge in the middle of the two verandahs. The plaintiff, therefore, sued the defendant to obtain an order for the removal of the front wall as well as the "pallee."

The Subordinate Judge rejected the claim for the removal of the wall, but awarded damages instead. He rejected the claim for the "pallee" altogether. Mr. Hosking amended that decree by ordering the removal of the wall.

The special appeal was heard by Sargent, Acting C.J., and Kemball, J.

Shántārām Nārāyan for the original defendant.

Nagindās Tulsidās for the original plaintiff.

PER CURIAM :—The Assistant Judge has found that the defendant, in breach of his agreement with the plaintiff, has built his new wall about 18 inches in advance of the plaintiff's. This, however, is not sufficient, of itself, to justify the Court in granting a mandatory injunction ordering its removal. It should be also satisfied that the new wall so materially interferes with the comfort and convenience of the plaintiff, that the consequences of the breach of agreement cannot adequately be compensated by damages. Further, it should enquire whether the plaintiff protested against the new wall being built, whilst in course of erection, or quietly acquiesced in what the defendant was doing, and only objected when the wall was completed. In the latter case the Court should only award damages. The decree must, therefore, be confirmed so far as relates to the "pallee," and reversed so far as it orders the defendant's wall to be removed. The Judge to pass a new decree on the latter part of the plaintiff's claim, after raising the necessary issues, having regard to the above remarks. Parties to be allowed to give evidence on the fresh issues.

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v.
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DAS.

Decree reversed and case remanded.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 236 of 1872.*1873.
February 14.RA'YA RA'GHOBA' KA'MAT *Appellant.*

ANAPURNA'BA'I KOM SUBA'LBHAT AND

OTHERS..... *Respondents.**Registration—Act XX. of 1866, Sec. 88—Registration after proper time.*

The accepting of a document for registration, after the expiration of the period mentioned in Part IV. of Act XX. of 1866, is not a mere defect of procedure. The Registrar who registers a document so presented acts without authority.

THIS was a special appeal from the decision of A. L. Spens, Judge of the District of Kanara, affirming the decree of the Subordinate Judge of Karwar.

The facts of the case, in so far as they are material, are briefly as follows :—

On the 22nd of September 1865, the husband of the first defendant executed in favor of the plaintiff an instrument for the repayment of a sum of money lent, and mortgaging a piece of land as security. This instrument was not registered until twenty-five months after the date of its execution. It was presented for registration on the 25th October 1867, that is, long after the expiration of the period allowed by the Registration Act, and was registered in pursuance of an order of the District Registrar who excused the delay in presentation. The document was registered on the 21st of January 1868.

The plaintiff had filed a suit on this document on the 30th of December 1865 ; but, the document being then unregistered, the suit was, under Section 97 of Act VIII. of 1859, withdrawn, with liberty to bring a fresh suit. Steps were then taken to get the document registered, and it having been registered under the circumstances mentioned above, the present suit was filed on the 22nd of January 1870.

The Judge of the court of first instance rejected the claim, considering that the document, though actually registered, should be treated as an unregistered document, the registration having, in his opinion, been illegal. The court of appeal agreed with the court of first instance on the point of registration, but confirmed the decree on the ground of the suit being barred by the law of limitation.

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SUBA'LBHAT
AND OTHERS.

The special appeal was argued before SARGENT, Acting C. J., and KEMBALL, J.

Shántarám Náráyan for the appellant—The instrument sued on was, as a matter of fact, registered. There was no fraud or concealment of any kind either in the act of presentation to or registration by the Registrar. The circumstances under which the delay occurred were mentioned and the delay was duly accounted for and the District Registrar, excusing the delay, ordered registration. The registration having been made as a matter of fact, the defect, if there were any, was one of procedure and protected by Section 88 of Act XX. of 1866.

Shámráv Vítal for the respondents was not called on to reply.

PER CURIAM:—We are of opinion that the act of accepting a document for registration, after the expiration of the period mentioned in Act XX. of 1866, and registering the same, is not a mere defect of procedure. In this opinion we are supported by the judgment of the Court in Regular Appeal No. 8 of 1869 (*Bábá Shanbhog v. Dasappa*). The Registrar acts without authority when he registers a document not presented within the period mentioned in Part IV. of the Act. The acts and formalities which accompany and constitute the act of registration are matters of procedure, defects in which are provided for by Section 88.

We must confirm the decree.

Decree confirmed.

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April 5.

[ORIGINAL CIVIL JURISDICTION.]

KA'SSIRA'V R. SA'HEB HOLKAR AND ANOTHER. *Plaintiffs.*

VITHALDA'S MANGALJI *Defendant.*

Practice—Attachment—Equity of Redemption—Immoveable property in possession of mortgagee—Civ. Proc. Code, Secs. 235 and 246.

A mortgagee, in possession of mortgaged premises that have been attached by prohibitory order under Sec. 235 of the Code of Civil Procedure, in execution of a decree obtained against his mortgagor, is entitled to come in under Sec. 246 of the Civil Procedure Code and have the attachment raised.

THE plaintiffs in the above suit, by a prohibitory order issued under Section 235 of the Code of Civil Procedure, bearing date the 2nd of December 1872, attached, in execution of a money decree they had obtained against the defendant, a house assessed as No. 81, situated in the Kalbadevi Road, and a second house, adjoining the former, assessed as No. 1, situated in Withalwadi Street.



On the 22nd of February 1873, Vináyakráv Ganpatráv, Gopálráv Ganpatráv, and Makundráv Ganpatráv, carrying on business in Bombay under the name of Ganesh Vináyak, took out a Judge's summons, calling upon the plaintiff to show cause why the said attachment should not be removed.

From the affidavits filed in the matter, it appeared that the premises in question had been conveyed, on the 5th of January 1859, by V. and N. Mádhavdás to the firm of Ganesh Vináyak and their *munim*, Balvantráv Bhikáji. The purchase money had been paid by the firm of Ganesh Vináyak at the request, and on account, of the defendant, on condition that if the defendant should repay to the firm of Ganesh Vináyak the purchase money they had advanced with interest and should adjust and settle the balance of his general account with the firm, the firm should convey the premises to the defendant. The purchase money, which amounted to Rs. 16,500, was then debited to the defendant in the books of Ganesh Vináyak.

The firm of Ganesh Venáyek collected the rents and profits of the premises and held the same to secure payment by the defendant to them of the said purchase money and interest and the balance of their account with the defendant, until the premises were attached.

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The plaintiffs did not admit that the premises were held by the firm of Ganesh Venáyek, subject to the conditions above referred to, but (without waiving that point) alleged that the value of the premises at the date of attachment was greater than the amount of the mortgage debt, and that the interest upon the purchase money had been more than paid by the rents and profits that the firm of Ganesh Vináyek had received, and that, therefore, the defendant had an interest in the premises which the plaintiff was entitled to attach and sell.

The summons was argued in chambers before SARGENT J.,

Marriott showed cause, and contended that the defendant was entitled to an equity of redemption in the premises, and that such equity of redemption was property (and it might be very valuable property) which was liable, like all other property of the defendant, to be attached and sold. He contended that if it were held otherwise, fraudulent debtors could easily mortgage their immoveable property much below its real value to *bond fide* mortgagees and give up possession to them, and thus defeat altogether the claims of the mortgagor's creditors.

Mayhew, in support of the summons, said that it was the invariable practice of the Court, at the instance of a mortgagee in possession, to raise an attachment laid upon the premises mortgaged to him, and relied upon the case of *Nagsi Sevdás v. Punjábái*,* where BAYLEY, J., decided this point after argument. He contended that an equity of redemption was not property of which the mortgagee in possession was trustee for the mortgagor within the meaning of Section 246 of the Code. As to the hardship of the case, he said that the

* *Note*.—Suit No. 771 of 1869, decided by BAYLEY, J., on the 6th of August 1870.

1873. judgment creditor of the mortgagor had a right to file a suit to redeem the mortgagee, and thus upon payment of the amount due upon the mortgage to render the mortgaged premises liable to his claims.

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Cur. adv. vult.

On the 5th of April, SARGENT, J., ruled that the firm of Ganesh Vináyák were not in possession of the mortgaged premises as trustees for the defendant, and directed the attachment that had been laid upon the mortgaged premises to be raised, and ordered the plaintiff to pay the costs of the summons.

Attorney for the plaintiff: *C. Tyebji.*

Attorneys for the claimants: *Dallas and Lynch.*

March 20.

[CROWN CASES.]

REG. V. NA'THA'LA'L PITA'MBAR.

Certiorari—Conviction on Merits—Error in decision on merits—Jurisdiction of High Court to interfere—Act XIII. of 1856, Section CXI.

Section CXI. of the Police Act (XIII. of 1856) does not give jurisdiction to the High Court, when a case is brought before it on *certiorari*, to enquire whether the Magistrate has come to a correct conclusion as to the guilt or innocence of the prisoner. The object of that section is to limit the objections to a conviction to some substantial meritorious ground, such as want of jurisdiction or the like, and to prevent a conviction from being quashed on a mere error of form or of procedure. But the section does not give the High Court any right to interfere on the ground that the Magistrate has come to a wrong conclusion on the question of the guilt or innocence of the accused person.

Though affidavits may be used to show a want of jurisdiction in a Magistrate, even though such affidavits contradict for this purpose the finding of the Magistrate, they cannot be used as affording materials for reviewing the Magistrate's decision on the merits.

ON the 4th day of March 1873, *Mayhew* obtained from Green J. a rule *nisi* calling upon Charles Philip Cooper, Esquire, Second Magistrate of Police for the Town and Island of

Bombay, to show cause why a writ of *certiorari* should not issue for the removal into the High Court of the proceedings taken before him in the matter of a complaint made against Náthálál Pitámbar and his conviction thereon.

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PITÁ'MBAR.

Náthálál Pitámbar had, on the 20th of February, been convicted by the Second Magistrate of stealing currency notes of the value of Rs. 50, and, for such offence, had been sentenced to two months' rigorous imprisonment.

The affidavits upon which the rule was granted (the substance of which appears from the judgment of the Court) were put in to show: (I)—that the conviction of the prisoner was wrong on the merits, and (II)—that he had not been given an opportunity by the Magistrate of calling witnesses on his behalf.

The Magistrate made his return to the rule by sending up the charge sheet relating to the trial and conviction of the prisoner and the original depositions taken upon the trial. Affidavits were also filed on behalf of the Magistrate to show that the prisoner had been allowed ample opportunity of calling witnesses on his behalf.

The rule was argued before Green, J., on the 18th March 1873.

The Honourable A. R. Scoble (Advocate General) showed cause against the rule, and contended that it ought to be discharged, as there had been no error in the proceedings, or want of jurisdiction in the Magistrate to try the case, and the Court had no power to enter into the merits of the conviction or to consider whether, upon the evidence, the Magistrate had arrived at a correct or an erroneous conclusion. The jurisdiction exercised by the High Court is the same as that exercised by the Court of Queen's Bench in England, and that Court could not interfere in a case like the present: *R. v. Ross* (a); Paley on Summary Convictions, p. 402.

(a) 1 Jur. N. S. 803; 24 L. J. M. C. 130.

1873. *Ansley* (with him *Mayhew*), in support of the rule, contended that the jurisdiction of the Court was extended by the 111th section of Act XIII. of 1856, which, by implication, gave the Court power to enter into the merits of a conviction, and that the decisions of the Courts in England in cases of *certiorari* were, therefore, not applicable. He also contended that in the present case there had been no trial, as the witnesses or the prisoner had not been examined. *R. v. Grant* (b) shows that an error such as this is a ground for quashing a conviction: *Paley on Summary Convictions*, p. 118, 5th Ed.

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Cur. adv. vult.

GREEN, J:—In this case a rule has been granted on the application of the prisoner Náthálál Pitámbar, calling upon Charles Philip Cooper, Second Magistrate of Police for Bombay, to show cause why a writ of *certiorari* should not issue to remove into this Court certain proceedings taken before the said Magistrate on the 19th and 20th February last, in the matter of a complaint made against the said Náthálál Pitámbar by one Munilál Keshavlál, and the conviction thereon of him, the said Náthálál Pitámbar. The rule was granted subject to the applicant depositing Rs. 300 as security for any costs awarded to be paid by him, the applicant.

The charge against the prisoner, of which on the 20th February he was convicted by the Magistrate, was of stealing certain currency notes for the amount of Rs. 50, a charge over which the Magistrate had jurisdiction under Sec. 27 of Act XIII. of 1856.

That this Court has jurisdiction to remove and quash convictions and sentences of the Police Magistrates and Petty Sessions of this town and island in cases where the Court of Queen's Bench in England would do so in respect of inferior criminal courts of that country, there can be no doubt. The Act itself in Sec. CXI. recognizes the existence of such a jurisdiction, and provides that "no conviction, order, or judgment of any Magistrate, or in Bombay of the Court of Petty Ses-

(b) 19 L. J. Q. B. 88.

sions, shall be quashed for error of form or procedure but only on the merits." This section, however, by no means says that a conviction may be quashed where a Magistrate may be considered to have come to a wrong conclusion on the evidence before him. *That* has never been a ground for a writ of *certiorari*. The section is directed to this, that the objection to the conviction must have a substantial meritorious ground, and not be merely an error of form or procedure. Such cases would of course be when the Magistrate has convicted an accused person of a charge which the Magistrate had no jurisdiction to hear and determine, or had awarded a sentence which he had no power to award, or had proceeded in such a manner as to afford ground for saying that the accused person had not had reasonable opportunity of defending himself. There may, of course, be other classes of cases in which an objection to a conviction would be entertained by this Court when it could be said that the accused had merits. But though an accused person may have merits in the general sense of the word and of the most substantial kind, viz., that the Magistrate has come to a wrong conclusion on the question of guilt or innocence, yet that is not a case to which *per se* a remedy can be applied by means of a *certiorari*. The section, in short, says that to quash a conviction there must be merits, not that whenever there are merits in the general sense of the word the conviction will be quashed.

In the present case the prisoner has filed a considerable number of affidavits, some of them to show that he is a man of respectable position and very considerable wealth, and others by persons present on the occasion when the alleged theft was committed, to show that the prisoner was not the guilty person. The only purpose for which these affidavits can be looked at is, in my opinion, as showing that there were persons able and willing to give material and relevant evidence on behalf of the prisoner, who, as a matter of fact, were not heard by the Magistrate.

Though affidavits may be used, as appears by *The Queen v. Bolton (c)*, to show a want of jurisdiction in Justices of the

(c) 1. Q. B. 66,

1873. Peace, even though such affidavits contradict for this purpose
 REG. the finding of the Justices, it is quite clear they cannot be
 v. used as affording materials for reviewing the Magistrate's
 NA'THA'LA'L. decision. Where the charge is such that, if true, it would
 PITA'MBAR. give the Magistrate jurisdiction, his decision is final.

The only ground on which I considered it possible on the application for the rule that the prisoner had any case, was that he had not had reasonable opportunity of defending himself. The case made by the prisoner in his original affidavit was this—that at the adjourned hearing of the charge, viz., on the 20th February, he attended, with certain witnesses (who, by their affidavits, support the prisoner in this), that he wished the assistance of his pleader, Mr. Nagindás Tulsidás, and informed the Magistrate that such pleader was ill and unable to attend, and that he asked the Magistrate to postpone the further hearing of the charge, but that the Magistrate, after putting a few more questions to the policeman who had found the stolen property, and without asking if the prisoner had any witnesses to call, sentenced him to two months' hard labour in the county jail. It is to be observed that the prisoner does not here allege that he made any application to have his witnesses examined or informed the Magistrate that he had witnesses. The Magistrate and the interpreter of the Girgaum Police Court have made affidavits from which it appears that on the first day, viz., the 19th February, after the examination of three witnesses in support of the charge, the Magistrate asked the prisoner what he had to say in his defence, and the prisoner in reply stated that he did not steal the notes, that he (the Magistrate) then asked the prisoner if he had any witnesses, and he replied yes, and two witnesses were examined as to the prisoner's character. That the Magistrate then asked the prisoner if he had any other witnesses and he said no. This statement of what occurred on the first day is not in any way contradicted on the part of the prisoner in his affidavit in reply. The Magistrate states further, that as it appeared from the examination of Nánábhái Lakshmirám, one of the witnesses of the prisoner,

that Nagindás Tulsidás had been engaged as pleader for him (the prisoner) in a case pending on the appellate side of the High Court, he (the Magistrate) asked the prisoner if he would like to call Nagindás, and that after some consideration the prisoner said he would like to call him on his behalf, that he (the Magistrate) thereupon remanded the case to the next day and released the prisoner on bail, and that the prisoner neither sought to examine more witnesses nor indeed applied for the remand so granted. The Magistrate further states that on the 20th February the case was called on and he asked the prisoner if Nagindás was present, when he said "No ; he is sick;" and in answer to a further question in this behalf, that he (the prisoner) had not taken out a witness summons for Nagindás. The Magistrate further states that the prisoner did not ask him to remand the case for the attendance of Nagindás, nor did he tell him (the Magistrate) that he had retained Nagindás for his defence or that he wished Nagindás to attend in his professional capacity; and that nothing whatever was said to alter his (the Magistrate's) impression that Nagindás was only to be called as a witness to character; that the prisoner did not, nor did any one on his behalf, inform him (the Magistrate), nor did he (the Magistrate) know that the prisoner wished to call any other witness or witnesses or that he had any other witness or witnesses in attendance other than those called by him on the previous day. The affidavit of Vámanráv Balvant, the interpreter, supports the statement of the Magistrate, and in particular that on the 20th February the accused did not say a word about his intention that Nagindás should appear for him as his vakeel or that he wished to call witnesses, and that he (the deponent) did not know that he had taken out any witnesses' summons. In reply the prisoner makes an affidavit stating that he did speak in Court on the 20th March last (a mistake, I suppose, for February) to the effect denied in paragraph 5 of Mr. Cooper's affidavit, and that he spoke in Gujarathi and did not understand English. It appears to me quite clear that the prisoner did not at any

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1873. rate make the Magistrate understand that he either had engaged or wished to have the assistance of Mr. Nagindás Tulsidás in the capacity of vakil, or that on the adjourned hearing he made the Magistrate understand (if indeed he spoke at all to that effect) that he had witnesses present and wished to have them examined. On the first day the Magistrate had asked the prisoner if he had any more witnesses beyond the two already examined on his behalf, to which the prisoner answered no. The case was remanded, as appears, at the instance of the Magistrate himself, for the examination, as a witness, of Mr. Nagindás, and as the prisoner did not profess to have even served him with a summons and as Mr. Nagindás was not in attendance, I cannot see any ground whatever on which the conduct of the Magistrate can be impeached. The proper course, no doubt, is for a Magistrate to give the accused an opportunity of producing his witnesses and evidence by formally calling on him to do so. This opportunity had been given on the first day, and though it does not appear that on the second day the question was repeated, I cannot consider that under the circumstances of the case and having regard to what had taken place on the first day, there was any omission of duty on the part of the Magistrate. As, therefore, no ground of any illegality or irregularity of procedure on the part of the Magistrate has been established, and as there is no question that the Magistrate had jurisdiction to deal with the charge, I must discharge the rule and order that the costs of showing cause against it be paid out of the deposit.

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It is possible, no doubt, that the prisoner may have been wholly innocent of the charge of which he has been convicted, and there is a certain amount of improbability that he should have been guilty of stealing such a sum as Rs. 50, if he be a man of the position and substantial wealth deposed to in the affidavits filed in support of this application. But his only remedy is to apply in the proper quarter (if so advised) for a remission of his sentence. I do not feel that it is within my province on this application (and having regard also to the cir-

cumstance that I did not hear the witnesses who *were* examined) to do more than intimate my opinion, that if the evidence now placed before this Court had been before the Magistrate and believed by him, he might not improbably have dismissed the charge; but on the evidence before him I cannot see any ground for considering that his conclusion was an improper one, and his proceedings, as I have already said, were, in my opinion, regular and according to law. I should suggest to the prisoner that he should furnish the Magistrate with office copies of the affidavits used on this application, and request him to consider the same with a view to making any representation he may feel justified in doing to the local Government as to the remission of the sentence.

Attorneys for the prisoner: *Chalk and Turner.*

For the Crown: *C. Peile*, Acting Government Solicitor.

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TO the same effect was the decision of BAYLEY, J., in the case of *R. v. Sakháram Anátobá and Sitáram Jagannáth*, who had been convicted by John Connon, Esquire, Senior Magistrate of Bombay, on the 16th of October 1872, of the offence of criminal breach of trust.

BAYLEY, J., in giving judgment on the 30th of November 1872, after referring to Sec. 111 of Act XIII. of 1856 and the cases of *The Queen v. The Justices of Oheshire*, 11 Add. & Ell. 139; *The Queen v. Bolton*, 1 Q. B. 66; *Thompson v. Ingham*, 14 Q. B. 710, 718; *Barber v. The Nottingham and Grantham Railway Company*, 33 L. J. C. P. 194; *The Queen v. Dayman*, 7 Ell. & B. 672; *Reg. v. John Connon*, 6 Bom. H. C. Rep. Cr. Ca. 27; and an unreported case of *The Queen v. Jan Muhammad*, heard by SAUSSE, C.J., and ARNONLD, J., decided that upon a writ of *certiorari* he had no jurisdiction to enter into the merits of the case or to consider whether or not upon the evidence the Magistrate had come to a correct conclusion and dismissed the rule *nisi* with costs.

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April 15.

[ORIGINAL CIVIL JURISDICTION.]

In Admiralty.

BARDOT AND ANOTHER.....*Plaintiffs.*

THE AMERICAN SHIP OR VESSEL " AUGUSTA" *Defendant.*

Jurisdiction—Admiralty—Collision—Foreign Ships—Discretion—Questions—communis jura—Consul's consent—3 & 4 Vic. c. 65—24 Vic. c. 1026 & 27 Vic. c. 24.

The Imperial Statutes 3 & 4 Vic. C. 65, 24 Vic. C. 10, and 26 & 27 Vic. C. 24, do not apply to the Admiralty or Vice-Admiralty jurisdiction of the High Court.

On that point, *The Asia* (5 Bom. H. C. Rep. O. C. J. 64) followed ; *The Portugal* (5 Beng. L. Rep. 323, 330, 331) disapproved.

The High Court, as now existing, was continued, not created, by the Letters Patent of 1865.

The High Court has jurisdiction, under the common maritime law, to entertain a suit in respect of a collision, upon the high seas, between two foreign vessels, although that collision may not have occurred in British or Anglo-Indian waters, and notwithstanding the opposition of the Consul of the State to which the defendant belongs.

Whether the High Court has a discretion to decline to entertain such a suit—*Quære.*

Even if there be such a discretion, the Court will ordinarily allow a suit of that nature to proceed.

THE pleadings and facts sufficiently appear in the judgment of the Court, upon a motion made, on the 7th day of April 1873, before WESTROPP, C. J., SARGENT and MELVILL, JJ., to discharge the warrant of arrest issued against the defendant vessel, the " Augusta."

Anstey and *Lang* in support of the motion to discharge the warrant of arrest of the *Augusta*.

Marriott and *Pigot*, for the plaintiffs, opposed the motion

In the course of the argument the following authorities were mentioned :—

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The Asia (a) ; *The Portugal* (b) ; *The Christiana* (c) ; *The Courtney* (d) ; *The Nina* (e) ; *Wendt's Maritime Legislation* 109 ; *The Johann Friederich* (f) ; *Wheaton* 110 n, 170, Pt. II., S. II., Chap. XII ; 18 *Dalloz, Droit Maritime* pl. 522, 2276, 2294, 2301, 2303, 2305, 2307, 2308 ; *Le Louis* (g) ; *Bonfils* 174 ; 1 *Pritch. Adm. Dig.* 283 ; 4 *Phillimore International Law* S. 815, p. 581 ; *The Zollverein* (h) ; *The Courier* (i) ; *The Golubchick* (j) ; *The Ida* (k) ; *Cope v. Doherty* (l) ; *The Two Friends* (m) ; *The North America* (n) ; *The Bold Buccleugh* (o) ; *The Mali Ivo* (p) ; *White v. Damon* (q) ; 1 *Kent Com.* 399 (p. 418 of 10th edn.) ; *Treaties between France and America of 1788 and 1853* ; and the several Statutes subsequently mentioned in the judgment of the Court. *The Jerusalem* (r).

Cur. adv. vult.

WESTROPP, C.J. :—This suit has been brought, at the Admiralty side of this Court, by the owner and the master of the French barque “Antares” (the latter suing on behalf of himself and the rest of her crew) against the American ship “Augusta” (now lying in Bombay Harbour), the freight due for her cargo, and her owners. The cause of action alleged by the plaint is a collision between the two vessels, on the 11th December 1872 at 2-40 A.M. in Latitude 20° south and Longitude 32° 35' west, whereby the “Antares,” her cargo, and the money, clothes, and private effects of her master and crew were sunk and totally lost. She was bound from Callao to the Havannah with a cargo of guano. The

- (a) 5 Bom. H. C. Rep. O. C. J. 64. (b) 6 Beng. L. R. 323, 330, 331.
(c) 2 Hagg. Adm. Rep. 183. (d) Edw. Adm. Rep. 239
(e) L. R. 2. P. C. 38. (f) 1 W. Rob. 35. (g) 2 Dods. 238
(h) Swabey R. 99. (i) Lushington 541. (j) 1 Wm. Rob. 143
(k) Lushington 6. (l) 4 Kay & J. 367 ; S. C. on App. 2 DeGex
& Jo. 614. (m) 1 C. Rob. 271. (n) 12 Moo. P. C. C. 331.
(o) 7 Moo. P. C. C. 284. (p) L. R. 2. Adm. & Ecc. 356.
(q) 7 Vesey 35. (r) 2 Gallison 198 ; and mentioned in *The Golubchick*
1 W. Rob. 145, 153.

1873. amount of damages claimed is Rs. 93,600. The plaint prayed
 BARDOT an arrest of the "Augusta" and her freight in order to
 v. answer that claim. A warrant of arrest having, pursuant to
 THE the prayer, been issued and executed against her, counsel on
 AUGUSTA. behalf of the owners of the "Augusta" and of the Vice-Con-
 sul of the United States of America (to whom notice of the
 institution of the suit was given by the plaintiffs' solicitors
 on the day on which the plaint was filed—the 1st of the
 current month of April) have moved before Sir Charles Sar-
 gent, Mr. Justice Melvill, and myself, that the warrant of ar-
 rest be discharged.

That motion has been based upon three grounds, viz. :—1st, that the collision having taken place on the high seas, and not in British or Anglo-Indian waters, and the vessels both belonging to foreign owners, this Court has not jurisdiction ; 2nd, that, even if the Court have jurisdiction, its exercise is discretionary, and, under the circumstances of the case, the proper course will be to decline to entertain the suit. The third objection was that the warrant had been obtained by fraud, namely, the concealment of the fact that the "Antares" was a French ship. That objection might, we think, have been well spared. Although the nationality of the "Antares" was neither stated in the title nor in the body of the plaint, the names of the owner and master, as appearing in the title, are manifestly French, it being there also mentioned that the owner is a resident of Nantes, in France. And the 6th of our Admiralty Rules, which is, I believe, a transcript of one of the English Admiralty Rules, and is the only rule expressly relating to the nationality of vessels or to suits against foreign vessels, requires that in a suit of necessities or of wages (suits of damage are not mentioned) the national character of *the vessel proceeded against* shall be stated. The national character of the vessel proceeded against in this case is mentioned in the plaint, and enough is stated as to the plaintiffs to lead us to the conclusion that there was not any disingenuous suppression of the nationality of their late vessel.

In support of the first objection—the alleged absence of jurisdiction—it has been, as we think, correctly argued that the Imperial Statutes 3 & 4 Vict., c. 65, 24 Vict., c. 10, and 26 & 27 Vict., c. 24, do not apply to the Admiralty or Vice-Admiralty jurisdiction of this Court. If we have jurisdiction to entertain this suit, it must be sought for in the general maritime law administered by Courts of Admiralty. For the reasons stated in *The Asia* (a), which it would be prolix here to repeat at length, the two first named Statutes (3 & 4 Vict., c. 65, and 24 Vict., c. 10) are inapplicable to the Admiralty Civil Jurisdiction of this Court, which is the same as that of the Supreme Court. Its jurisdiction was that of the High Court of Admiralty in England, as it stood on the 8th of December 1823, the date of the Letters Patent creating the Supreme Court. Section 53 of those Letters Patent empowered that Court to take cognizance of and determine all causes, civil and maritime, &c., “the cognizance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England.” The jurisdiction in Vice-Admiralty was created by commission from the High Court of Admiralty in England, dated the 21st August 1843, nominating Sir Henry Roper, then Chief Justice of the Supreme Court at Bombay, “and the Chief Justice of the said Court for the time being, or the person executing the duties of such office, to be our Commissary in the Vice-Admiralty Court of the Island of Bombay and territories thereunto belonging,” and authorizing such Commissary “to take cognizance of and proceed in all causes civil and maritime, and in complaints, contracts, offences or suspected offences, crimes, pleas, debts, exchanges, policies of assurance, accounts, charterparties, agreements, bills of lading of ships, and all matters and contracts which in any manner whatsoever relate to freight due for ships hired and let out, transport money, or maritime usury, otherwise bottomry, or which do anyways concern suits, tres-

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30 & V. c. 65

24 V. c. 10

June 24th &

Practice &

H. C. of Adm^l

in England

26 V. c. 24

now amended

by 30, 31 V.

c. 57. V-A

C^o of Adm^l

excepting

India.

Commission

replaced in

India) 2 Wm

4 c. 51.

V-A. Com^l

above 2.

(a) 5 Bom. H. C. Rep. O. C. J 64, 66 68.

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passes, injuries, extortions, demands and affairs civil and maritime whatsoever, between merchants, or between owners and proprietors of ships or other vessels, and merchants or other persons whomsoever, with such owners and proprietors of ships and all other vessels whatsoever used or employed, or between any other persons howsoever had, made, begun, or contracted for any matter, cause, thing, business, or injury whatsoever done or to be done as well in, upon, or by the sea, or public streams, fresh waters, ports, rivers, creeks, and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, or upon any of the shores or banks adjoining to them or either of them, together with all and singular their incidents, &c., &c., and such causes, complaints, &c., and other the premises above said, or any of them, howsoever the same may happen to arise, be contracted, had or done, to hear and determine according to the civil and maritime laws and customs of our High Court of Admiralty of England, in our said Island of Bombay and territories thereunto belonging whatsoever ;” (here follow many other provisions not material in the present case) “and to promulge and interpose all manner of sentences and decrees and to put the same in execution with cognizance and jurisdiction of whatsoever other causes civil and maritime which relate to the sea, or which any manner of ways respect or concern the sea or passages over the same, or naval or maritime voyages, performed or to be performed, or the maritime jurisdiction above said, with power also to proceed in the same according to the civil and maritime laws and customs of our aforesaid Court *anciently used*, as well those of mere office mixed, or promoted, as at the instance of any party, as the case shall require and seem convenient.”

The Letters Patent of the 26th June 1862 ordained that the High Court at Bombay “shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty, or by any Judge of the said Court as Commissary to the Vice-Admiralty

Court, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions, arising in India, as is now vested in any Commissioner or Commissioner appointed by Us or Our Predecessors," under Stat. 39 & 40 Geo. III., c. 79, s. 25. The Letters Patent of the 28th December 1865 ordained that the High Court at Bombay "shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty, or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions, arising in India, as may now be exercised by the said High Court."

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The Statute 3 & 4 Vict., c. 65, passed in 1840, "to improve the practice and extend the jurisdiction of the High Court of Admiralty in England," by its 4th section gave, to that Court, "jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the Registry, arising in any cause of possession, salvage, *damage*, wages, or bottomry," and, by its 6th section, "jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessities supplied to any *foreign* ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or *damage* received, or necessities furnished, in respect of which such claim is made."

In *The Australia* (b), which was an appeal in a cause of possession from the Vice-Admiralty Court at Hongkong heard in 1859, Dr. Lushington, in delivering the judgment of the Privy Council, said: "I ought to have said one word with respect to the jurisdiction in cases of this kind. Their Lordships have decided this case upon its merits, because

(b) Swabey R. 480, 488.

1873. it appeared to them that it would be more satisfactory on
 BARDOT the whole so to do, but the state of the law must be taken
 v. to be this. A Vice-Admiralty Court has no more than
 THE the ordinary Admiralty jurisdiction. That jurisdiction is
 AUGUSTA. the jurisdiction which was possessed by Courts of Admiralty
 antecedent to the passing of the Statute (3 & 4 Vict., c. 65) which enlarged it. What is the nature of that jurisdiction in a cause of this description will be seen from the judgments of Lord Stowell upon that subject, which are collected in Mr. Pritchard's Digest. It would be a dangerous thing, after the hearing of this cause, to resort to a Vice-Admiralty Court for the purpose of trying the title to a ship in a case of this description." And in *The Rajah of Cochin (c)*, he said in the same year: "I am of opinion that by Statute, and for other reasons, the Vice-Admiralty Courts in our colonies, properly constituted, exercise the same jurisdiction as this Court, with one exception, and that is, where particular powers are conferred upon this Court by name, and not upon the Vice-Admiralty Courts; and there are instances to that effect." The Statute 3 & 4 Vict., c. 65, is such an instance. It is proper here to observe that the Commission of Vice-Admiralty for Bombay, though bearing date in the year 1843, and, therefore, subsequent to the passing of the Statute 3 & 4 Vict., c. 65, in 1840, contains no reference to the statutory powers of the High Court of Admiralty in England, but speaks only of "the civil and maritime laws and customs anciently used," and it is also important to note that the Vice-Admiralty Commission for Hongkong, with reference to which Dr. Lushington's above quoted remark in *The Australia* was made, must also have been issued subsequently to the passing of the Statute 3 & 4 Vict., c. 65, in 1840, inasmuch as the Treaty of Nankin whereby Her Majesty acquired the island of Hongkong was signed on the 30th August 1842, and it was not regularly constituted a British colony until the 26th

June 1843. The Vice-Admiralty Commission for Bombay seems to be in the usual form, of which Sir Christopher Robinson, in an opinion given by him in 1821 (*d*), says: "The commission of the Judges of the Vice-Admiralty Courts agrees in substance with that of the High Court of Admiralty, and is an instrument of ancient date, and comprehends many subjects, which have been formerly under jurisdiction, but have been withdrawn, or restrained, by usage or the authority of superior courts. The commission still retains its ancient form, and is acted upon under those limitations in the High Court of Admiralty, according to the principles which have been applied to it, and are as well known as any other general principles on which it proceeds; and I think the same restrictions ought to be applied to the exercise of that jurisdiction in the Vice-Admiralty Courts, *except on points on which special jurisdiction may have been given by statute*;" and he accordingly advised that, notwithstanding the form of the Commission, the Vice-Admiralty Court at the Mauritius had not then "a jurisdiction over transactions of policies of assurance, charter parties, and other civil contracts, which have been withdrawn from the general jurisdiction" of the Court of Admiralty in England. As to the non-applicability of the Statute 3 & 4 Vict., c. 65, to the Courts of Admiralty in British India, we may refer without here repeating them, to the remarks made in *The Asia* (*e*), upon *Murray v. Langford* (*f*), decided in the Supreme Court at Calcutta in 1842-43.

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The Merchant Shipping Act (1854) 17 & 18 Vict., c. 104, Sec. 527, relates to *injuries* done in any part of the world to property belonging to Her Majesty or to any of Her Majesty's subjects, by any foreign ship, and empowers Courts in the United Kingdom only to arrest such foreign ship when "found in any port or river of the United Kingdom, or within three miles of the coast thereof." That section, therefore, cannot affect the present suit brought here in

(*d*) Forsyth Cas. & Opin. 94, 95.

(*e*) 5 Bom. H. C. Rep. O. C. J. 68, 69. (*f*) Fulton R. 95 130.

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Bombay, and to which the parties are French and American. As to this enactment, see *The Griefswald* (g) and *The Ticonderoga* (h).

The Statute 24 Vict., c. 10 (passed in 1861), reciting that "it is expedient to extend the jurisdiction and improve the practice of the High Court of Admiralty in England," enacts by its 7th section that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

The Statute 26 & 27 Vict., c. 24, was passed, in 1863, "to facilitate the appointment of Vice-Admirals and of officers in Vice-Admiralty Courts in Her Majesty's possessions abroad, and to confirm the past proceedings, to extend the jurisdiction, and to amend the practice of those Courts." Its 10th section declared that those Courts shall have jurisdiction in respect (amongst other matters) of "claims for damage done by any ship." As to this statute, the remarks of the late and deservedly lamented Mr. Justice Norman made as Officiating Chief Justice at Calcutta in the case of *The Portugal* (i), have been mentioned. He said: "I am certainly disposed to think that the High Court, as constituted by the Charter of 1862, had not, by virtue of the Admiralty Court Act, 1861 (24 Vict. c. 10), or otherwise, any jurisdiction over claims for disbursements by the master. But when the present High Court was constituted by the Charter of 1865, I am inclined to think that the Vice-Admiralty Courts Act, 1863 (26 & 27 Vict. c. 24) applied to such Court as a Vice-Admiralty Court established after the passing of that Act in a British possession, and consequently that I have jurisdiction to entertain the claim of the master for disbursements, and to treat the same as a maritime lien." In the concluding portion of that opinion, viz., that the Charter of the High Court of 1865 rendered the Vice-Admiralty Courts Act of 1863 applicable to the High

(g) Swabey R. 430.

(h) Ibid. 215.

(i) 6 Beng. L. R. 323, 330, 331.

Court, we are wholly unable to concur. In the first place the High Court was not a court "established after the passing of the Vice-Admiralty Courts Act 1863." We shall refer to the Bombay High Court Charters of 1862 and 1865 in discussing this point. They are in this respect similar to those of the High Court at Calcutta. The Charters of 1862 and of 1865 were granted under the authority of the Statute 24 & 25 Vict., c. 104, the 17th section of which empowered Her Majesty, at any time within three years after the establishment of the High Court, by her Letters Patent, to revoke the Letters Patent by which the Court was so established, in whole or in part, "and to grant and make such other powers and provisions as Her Majesty might think fit, and as might have been granted or made by such first Letters Patent—" a power extended by Statute 28 & 29 Vict. c. 15 to the 1st January 1866. Her Majesty did revoke the Charter of 1862 by the Charter of 1865, but by the 2nd section of the latter ordained that, "notwithstanding" such revocation, the High Court of Judicature at Bombay "shall be and *continue* as from the time of the original erection and establishment thereof, the High Court of Judicature at Bombay for the Presidency of Bombay aforesaid, and that the said Court shall be and continue a Court of Record," &c., &c. It is from this provision quite clear that it was the Court of 1862 continued with, however, such variations in its constitution as were made by the Charter of 1865. Moreover it was a Court constituted under a Statute (*j*), enabling Her Majesty to declare what its jurisdiction should be in Admiralty and Vice-Admiralty, as well as in other matters; and, in the Charter of 1862, Her Majesty did not confer upon it the statutory powers given to the Court of Admiralty in England by the Statute 3 & 4 Vict. or the Admiralty Act of 1861, nor did she, by the Charter of 1865, make any allusion to those Statutes, or to the Vice-Admiralty Courts Act of 1863, but merely gave to the High Court of 1865 the same jurisdiction in Admiralty

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(j) Stat. 24 & 25 Vict. Sec. 9.

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and Vice-Admiralty as the High Court of 1862. If, then, the argument rested there, we should have great difficulty in holding that the Vice-Admiralty Courts Act of 1863 had any application here. The argument, however, against any such application is rendered quite conclusive by the language of the Vice-Admiralty Courts Act of 1863 itself. In the interpretation clause (Sec. 2) it is stated that the term "Vice-Admiralty Court" shall mean any of the existing Vice-Admiralty Courts enumerated in the schedule marked A hereto annexed, or any Vice-Admiralty Court which shall hereafter be established in any British Possession." The Vice-Admiralty Courts of Calcutta, Bombay, and Madras are not included in the schedule. And the term "British Possession" is, in the interpretation clause, defined as "any colony, plantation, settlement, island or territory, being a part of Her Majesty's dominions, *but not being within the limits of the United Kingdom of Great Britain and Ireland or of Her Majesty's Possessions in India.*"

For those reasons, we must hold it to be quite clear that the Statutes 3 & 4 Vict. c. 65 (1840), 24 Vict. c. 10 (1861), and 26 & 27 Vict. c. 24 (1863), do not increase or in any wise affect our jurisdiction either in Admiralty or Vice-Admiralty, and that if we have jurisdiction to entertain this cause, that jurisdiction must be sought for outside those Statutes.

We must, then, endeavour to ascertain whether the High Court of Admiralty in England would, before the passing of the Statute 3 & 4 Vict. c. 65 and the subsequent Statutes, have taken cognizance of a suit founded upon a collision between two foreign vessels upon the high seas. We find that it has done so. In the year 1839, in *The Johann Friederich* (k), Dr. Lushington overruled a protest against the jurisdiction of the Court in a cause of collision, which protest was rested upon the ground that both vessels were the property of foreign owners, and the collision occurred whilst they

(k) 1 Wm. Rob. 35.

were in the prosecution of their respective voyages upon the high seas. He said: "Now no doubt could be entertained of this Court's jurisdiction, if the vessel that has been lost had been the property of British subjects. The question, therefore, arises; whether a foreigner should be deprived of the same privilege and protection. It is, I apprehend, a general rule that, save as to real estate, an alien friend is entitled to sue on the same footing as a British-born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatûs*, no objection could have been taken. It is said, however, that the proceedings in this Court are *in rem*, a mode of proceeding peculiar to this Court, and not the usual course adopted by the Courts in this country in the first instance. But admitting this to be true, analogous cases exist, as in that of foreign attachment, in which the property of foreigners may be attached in order to compel an appearance, or to secure bail to the action; and if such a process is open to the foreigner in that case, it is difficult to understand the grounds of disputing the jurisdiction of this Court in the present instance. It has also been said in the course of the argument, that this Court is not desirous of exercising its jurisdiction between foreigners; and, in support of this doctrine, some observations of Lord Stowell in cases of seamen's wages have been cited. But it appears to me that the cases cited are distinguishable from the present for the following reason:—that all questions of collision are questions *communis juris*, but in cases of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners, is whether the case be *communis juris* or not. In the case of *The Two Friends* (1),

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(1) 1 C. Rob. 271.

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which has been cited in argument, Lord Stowell takes the distinction between salvage on recapture and wages, and the distinction he takes is this, "that a salvage on recapture is a question *juris gentium* ; so, I apprehend, is civil salvage ; in which the *quantum meruit* is the only rule that exists for the guidance of the Court's discretion in apportioning the remuneration. But in cases of wages, the Court is called upon to take notice of the law of commerce, and the question must in most cases be decided by the municipal law of that country in which the seamen's contract is made." (m)

We have not overlooked the fact that Dr. Lushington rested his decision in *The Johann Friederich* on three grounds, viz. : 1st, that all causes of collision are causes *communis juris* ; 2ndly, that the vessel, at the time of her arrest, was within the Admiralty jurisdiction ; 3rdly, that the collision took place on the high seas close upon the English coast ; and that the two first grounds only exist in the present case, the collision not having taken place either near the coast of India or of England. We, however, think the two first grounds sufficient, and that the decision would have been the same in *The Johann Friederich*, even if the third ground had not existed in that case. It may be observed too that Trinidad, near which, upon the high seas, the collision, the subject of this suit, did take place, is a British colony—a fact perhaps not of much importance.

In April 1857 a collision took place in the Irish Channel on the high seas between Tuskar and Bardsey of two American ships, the "Tuscarora" and the "Andrew Foster," shortly after which the latter foundered and was lost with her cargo. Certain of the owners or consignees of cargo (of

(m) In *The Benares* (7 Notes of Cas. Supp. lii ;) decided in 1850, Dr. Lushington further illustrates the distinction between a cause of damage and a cause of wages or of bottomry, or any other arising purely *ex contractor*.

whom some would appear to have been British and some American) on board the "Andrew Foster" had obtained judgment in the Court of Admiralty in England (affirmed, on appeal, by the Judicial Committee of the Privy Council) whereby the owners of the "Tuscarora," who were Americans, were condemned in the damages consequent on the collision and in costs. The "Tuscarora" had been arrested by process of the Court of Admiralty and was liable to be sold. Similar actions had been commenced in respect of the collision by the remaining owners of cargo on board the "Andrew Foster" and by other persons as part owners of her. Under these circumstances the bill in *Cope v. Doherty* (n) was filed in Chancery by the owners of the "Tuscarora" who did not thereby deny their liability to be sued in England by the owners of the "Andrew Foster" and her cargo, but only endeavoured to limit that liability by seeking for the application of Secs. 504 and 514 of the Merchant Shipping Act of 1854 (17 & 18 Vict., c. 104, Pt. IX.) to their case. But it was held by V. C. Wood to be inapplicable to a case of collision *on the high seas* between two foreign ships; and he refused to take judicial cognizance that the law of America is, in respect of limitation of liability in such cases, the same as in those sections of the British Merchant Shipping Act, but was of opinion that if that identity were averred and proved, the Court could administer the American law between Americans. That decision was affirmed, on appeal, by Lords Justices Knight-Bruce and Turner (o).

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The following cases have not been overlooked by us:—
The Carl Johan (p) between a British and a Swedish vessel; *The General Iron Screw Company v. Schurmanns* (q) between a British and a Dutch ship; *The Wild Ranger* (r) between a British and an American ship; *The Zollverein* (s) between a British and a Prussian vessel; *The Griefswald* (t)

(n) 4 Kay & J. 367. (o) 2 DeGex. & Jo. 614.

(p) Cited in 1 Hagg. Adm. R. 113. (q) 1 Johns. & Hem. 180.

(r) 9 Jur. N. S. 134. (s) Swabey R. 96 (t) Ibid. 430

1873. between a British and a Prussian vessel; and *The Amalia* (u)
 BARDOT between a British and a Belgian ship; but, as they relate
 v. mainly to the question of limited liability, rather than to the
 THE question of jurisdiction, it is unnecessary to refer to them
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 upon the recent Statute 25 & 26 Vict., c. 63, s. 54, whereby
 the law of limited liability, in cases of collision, has been put
 on a new footing, the propriety of which has been questioned.
 See De Wendt's Maritime Legislation p. 109.

The North American (v) was a case of collision between a Spanish barque and an American ship. It is reported on appeal to the Privy Council from the Court of Admiralty in England in 1858. The Lords of the Judicial Committee who took part in that case, were Lord Kingsdown, Sir Edward Ryan, and Sir John T. Coleridge. The collision occurred in St. George's Channel. There was not any attempt made in that case to rest the jurisdiction on Statute Law. Nor was there any attempt to deny the jurisdiction. The law applied to the case was the maritime law common to all nations, as in *The Dumfries* (w) a collision between a Danish schooner and a British barque; and in *The Saxonia* (x) a collision between a Hamburg and a British vessel. With respect to the case of *The North American*, it is important to remember that it occurred in 1858, i.e., previously to the passing of the Admiralty Courts Act of 1861, and that, until that Act was passed, we have not met with any case in which the jurisdiction to entertain suits as to collisions between foreign vessels was rested, by the Court, or in the arguments of counsel, upon Statute Law.

The Diana (y), which occurred in 1862, was a case of collision between two British vessels in foreign inland waters. The jurisdiction was rested on the Admiralty Courts Act of 1861 (24 Vict. c. 10).

(u) 1 Moo. P. C. C. N. S. 471. (v) 12 Moo. P. C. C. 331.

(w) Swabey R. 63. (x) 15 Moo. P. C. C. 262.

(y) Lushington Rep. 539.

The Courier (z) was a case of collision in 1862, the owners of both vessels being foreigners. The collision happened in the port of Rio Grande. Dr. Lushington is reported as saying : " It is immaterial that the owners of both ships are foreigners : the Court has jurisdiction." He is not in the text represented as relying on the Admiralty Courts Act of 1861, but the head note of the case grounds the decision on the 7th section of that Act.

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The Ida (a), much relied upon for the defendants, was a case in which the Admiralty Court, in the year 1860, declined to entertain a suit brought by the foreign owners of cargo lately laden on board the English barque "Barbara Innes" against the schooner, "Ida," and her owners, and is not in point in the present case. It was not a case of collision proper, but of a personal tort committed by the master of the Danish schooner, whereby a portion of the cargo, which had been placed in a boat alongside the English barque, was lost at Ibraila in the river Danube, at a distance of about 99 miles from its mouth. Both the tort itself and the locality in which it was committed deprive the case of *The Ida* of any bearing upon a case of collision between two vessels upon the high seas.

The Mali Ivo (b) was a case of collision which occurred in the Bosphorus, on the 12th December 1866, between a Norwegian brig and an Austrian brig. The former sued the latter in the English Court of Admiralty in 1866, and in 1869 obtained a decree. Sir R. Phillimore, in giving judgment, said : " It has been said by the counsel for the defendant, that this Court would not be anxious to entertain such a suit, but it has not been said, and could not with propriety have been said, that the Court had not jurisdiction over the subject. It is well known that the jurisdiction of the High

(z) Lushington Rep. 541.

(a) Ibid 6.

(b) L. R. 2 Adm. & Eccl. 356.

1873. Court of Admiralty extends to all cases of collision happen-
 BARDOT ing upon the seas, that is within the ebb and flow of the
 v. tide." So far as we can perceive, the learned Judge was
 THE there speaking of the ancient law of the Admiralty and not
 AUGUSTA. of the Admiralty Court Act of 1861 ; and in the 4th Volume
 of his work on International Law, p. 581, plac. DCCCXV.,
 written apparently before the passing of the Admiralty
 Court Act of 1861, or the more recent Statute 26 &
 27 Vict., c. 24 (1863), he treats the Court of Admiralty
 as having jurisdiction to entertain a suit in respect
 of collision between two foreign vessels. He says: "In
 all cases of collision upon the high sea, or in foreign
 waters, between a foreign and English vessel, or *between two
 foreign vessels*, the wrongdoer, whether he be a foreigner or
 English subject, is ascertained by a reference to the old
 rule of the sea, founded on the principle of general maritime
 law, and not to the rule prescribed by the English statute.
 Cases of *collision*, like cases of *salvage*, are considered as
 belonging to the *jus gentium*."

In *The Halley* (c) Lord Justice Selwyn, in giving the
 judgment of the Privy Council in a suit promoted by a
 Norwegian against a British vessel in respect of a collision
 in 1867 off Flushing Roads, says: "The right of all persons,
 whether British subjects or aliens, to sue in the English
 Courts for damages in respect of torts committed in foreign
 countries, has long since been established ; and as is observed
 in the note to *Mostyn v. Fabrigas* in Smith's Leading Cases,
 Vol. I., p. 656, there seems to be no reason why aliens should
 not sue in England for personal injuries done to them by other
 aliens abroad, when such injuries are actionable both by the
 law of England and also by that of the country where they are
 committed, and the impression which had prevailed to the
 contrary seems to be erroneous." *A fortiori* should they
 be at liberty so to bring civil suits against each other for
 injuries committed upon the high seas.

It is well settled in the Admiralty Courts, both of England and America, that the jurisdiction to entertain a suit between foreigners does not depend on the assent of the Consul or minister of either nation, although in certain suits, more especially suits for wages or otherwise upon contracts, the assent or dissent of the consul or minister may influence the Court on the question whether or not it will exercise the discretion, which in such suits is vested in it, as to entertaining the suit or not.

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In *The Nina* (d), which was a suit, by a British seaman employed on board a foreign ship, for wages, it was admitted by the Privy Council that the Consul of the nation to which the foreign vessel belonged was entitled to notice of the suit, and Lord Romilly, in giving judgment on behalf of their Lordships, further said: "With respect to the third question, their Lordships are of opinion that the protest of the Foreign Consul does not 'ipso facto' operate as a bar to the prosecution of the suit. The Foreign Consul has not the power to put a veto on the exercise of its jurisdiction by the Court of Admiralty. It is well observed by Dr. Lushington, in the case of *The Golubchick* (e), that the jurisdiction of the Court of Admiralty cannot depend upon the will of a Foreign Consul; that as he cannot confer the jurisdiction, so he cannot take it away. If the Consul protests, but advances no reasons, the suit will proceed. If he advances reasons for staying the suit, the plaintiff must be at liberty to dispute the facts and answer the reasons put forward by the Consul; and, then, the Judge of the Court of Admiralty is to exercise his discretion and determine whether, having regard to those reasons, with the answers thereto, it is fit and proper that the suit should proceed or be stayed. By discretion is meant, to use the words of Lord Eldon in *White v. Damon* (f), not an arbitrary, capricious discretion, but one that is regulated upon grounds that will

(d) L. R. 2 P. C. 47 and S. C. in L. R. 2 Adm. & Eccl. 44.

(e) 1 Wm. Rob. 143.

(f) 7 Ves. 35.

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make it judicial. That the exercise of this jurisdiction by the Court of Admiralty lies in the discretion of the Court in the sense before stated, is established by a long line of authorities, from the time of Lord Stowell down to the present. They are all one way, and they are, in the opinion of their Lordships, conclusive on this subject. And their Lordships concur in the decision of the late learned Judge of the Court of Admiralty in the case of *The Octavia*, that this discretion is not taken away by the 10th section of the Admiralty Jurisdiction Act, already referred to." That, in America, neither does the assent of the Consul or minister confer, nor does his dissent take away, jurisdiction, will be seen in the American author's work to which we shall presently refer on the question of discretion.

For these reasons, we have not any doubt that, by common maritime law, this Court has jurisdiction to entertain this suit.

The 2nd question remains for consideration. Assuming that the Court has jurisdiction, is the exercise of it discretionary, and, if so, is this a proper case for its exercise? We must commence by saying that we have not discovered any instance of collision on the high seas, between foreign vessels, in which the Admiralty Courts have laid it down that the entertainment of a suit in that respect is discretionary. The question was raised in *The Mali Ivo* (g), but Sir R. Phillimore declined to pronounce any opinion upon it. He admitted that in suits for wages, instituted by foreign seamen against foreign masters, the Court had a discretion to entertain or refuse them, but that discretion, he said, "is certainly distinguishable in principle from a discretion to be exercised, as in the case before him, for the purpose of preventing the subject of one foreign nation from suing the subject of another foreign nation in a cause of damage done to the vessel of the former upon the sea." He then proceeded thus: "It is another and different question whether, if there be, as is contended in this case, a *lis alibi*

(g) L. R. 2 Adm. and Eccl. 358.

pendens, the Court has not a discretion, or, perhaps, even a duty, to refuse the exercise of its jurisdiction, upon the same subject matter between the same parties, unless that litigation be discontinued. I am aware that it has been decided by the Court of Common Pleas, in the case of a foreigner against whom an action of contract was pending in his own country, at the suit of the plaintiff, and who came over to this country, and was sued here by the plaintiff for the same demand, that the pendency of the action in the foreign country was not a sufficient ground for staying proceedings in the action here: *Cox v. Mitchell* (h): and I have considered that part of the case of *The Bold Buccleugh* (i) which refers to this subject. I have referred also to the cases of *The Griefswald* (j), *The Lanarkshire* (k), *The Bengal* (l), and *The John & Mary* (m); and I have come to the conclusion that it would be my duty either to suspend proceedings in this Court, or to put the parties to their election as to which Court they would have recourse to, if, indeed, the evidence before me established that there was a *lis alibi pendens* before a tribunal which could afford the plaintiff a complete remedy, whether the proceedings were technically instituted *in rem* or *in personam*. I am also of opinion that the Austrian Consular Court of Constantinople would come within this category of a competent tribunal, inasmuch as, by the well-known capitulations by treaty, sufferance, and usage, the Austrian Empire, like other Christian States, has acquired from the Ottoman Porte an exclusive right of jurisdiction, to be exercised over its own subjects in suits of this kind within the limits of the Ottoman territory." * * * "As a matter of fact, however, I am satisfied that there is no suit pending between the litigants now before me on the same subject as that upon which I am now called to adjudicate."

In the present case, it is not pretended that there is any *lis alibi pendens* in respect of the collision, the subject of this suit.

(h) 7 C. B. N. S. 55

(j) Swabey 430.

(l) Swabey 468.

17 H C

(i) 7 Moo. P. C. 283.

(k) 2 Spinks. 189.

(m) Ibid 471.

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In the *Law of Shipping* published in 1869 at Boston in the United States by Dr. Parsons, Dane Professor of Law in Harvard University, after referring to the English authorities, he says (Vol. 2, p. 226): "In this country (the United States) it seems to be settled, after some controversy, that our Admiralty Courts have full jurisdiction over suits between foreigners, if the subject matter of the controversy is of a maritime nature. It is, however, a question of discretion in every case, and the Court will not take cognizance of the cause, if justice would be as well done by remitting the parties to their own forum. In one of the most elaborately considered cases on this subject, *The Jerusalem* (n), jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte, and it did not appear that it was interdicted that the vessel should come to the United States. Claims for salvage, which depend for their determination upon the law of nations, will generally be considered by our courts. It is, however, in cases of seamen's wages that the power of the courts is most frequently invoked, and it is well settled that cognizance of a suit will be taken whenever justice demands that it should be done, as where the voyage is broken up at a port of this country, or the seaman is compelled to desert on account of cruel treatment, or is entitled to be discharged on account of a deviation." In note 5, 226, Dr. Parsons mentions the case of *One Hundred and Ninety-four Shawls* (o), which was a suit in respect of salvage of English goods by an English ship, in which, for very special reasons, an American Court of Admiralty, although holding that it had jurisdiction, declined to entertain the suit, and he mentions (p. 228 and notes) several suits for wages by foreign seamen against foreign captains, in which, for special reasons, the Admiralty Courts took the same course, but he does not mention any case of collision between foreign vessels in

(n) 2 Gallis on 198, before Mr. Justice Story. (o) Abbott Adm. 317.

which those Courts refused to entertain the suit. In speaking of wages suits (p. 229) he admits that American Courts seem to "go somewhat farther than the English Courts in requiring the assent of the minister or consul of the foreign country to which the parties belong; and some recognition on his part of the court is usually required;" but he adds that his assent is not indispensable to the jurisdiction. He mentions (p. 230) *Patch v. Marshall* (p) where "the libellant, an American citizen, had been hired in Boston for a voyage in an *English registered vessel with an English master*, from Boston to St. Jago and back to a port in the United States. The voyage was performed; and the crew discharged in Boston. An action was commenced in a cause of *personal damage*, and the English Consul filed a protest to the jurisdiction of the Court, setting forth that the vessel was a British vessel and the Commander a British subject. Also that 'an investigation of some of the alleged causes of damage must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his own government.' Mr. Justice Curtis overruled the protest and, on the merits, made a decree in favour of the libellant."

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Damage by collision gives to the owners of the injured vessel a lien on the other vessel if she be in fault: *The Bold Buccleugh* (q). A maritime lien, as Sir. J. Jervis, in giving the judgment in that case, explains, is distinguished from a lien at common law by not requiring possession. He says: "This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosoever possession it came. Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and

(p), Curtis C. C. 452. (q) 7 Moo P. C. 267.

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Mr. Justice Story (1 Sumner 78,) explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and, indeed, is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come." And it would seem that the party, entitled to the lien, acts prudently in enforcing it as soon as may be, for Sir J. Jervis adds: "It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosoever possession the thing may come."

The case before Mr. Justice Story, above referred to, was *The Brig Nestor* (r) where he lays it down as unquestionable that whenever a lien is given by maritime law, the Admiralty Court will enforce it by a proceeding *in rem*.

In *The Johann Friederick* (s) Dr. Lushington said: "But again; to this inconvenience it may be proper to set off the inconvenience that would arise, if no remedy here was open to the injured parties. If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return at all; and if she did return, there is no part of the world so distant to which they might not be sent for their redress. In the case of a British vessel proceeded against

(r) 1 Sumner 78.

(s) 1 Wm, Rob, 38.

by a foreigner, (and why a foreigner should have a preference as against British vessels I do not see) the foreigner might be sent to Australia, the East Indies, to Newfoundland, or Canada, and in case the vessel was a foreign vessel, to any part of the globe. From these considerations it is perfectly clear, that a refusal to exercise the jurisdiction of the court in these cases, would in effect amount to a total denial of justice."

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In *The Ticonderoga* (t) Dr. Lushington observed: "I am not aware, where there has been any proceedings *in rem*, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this Court to deprive the party complaining of the right he has, by the maritime law of the world, of proceeding against the property itself." And in *The Linda Flor* (u) he said: "In the case of a foreign ship doing damage and proceeded against in a foreign country, the injured party has no means of obtaining redress save by proceeding against the ship herself, which, I apprehend, is one of the most cogent reasons for all our proceedings *in rem*." And in *The Griefswald* (v) the same learned Judge says: "In cases of collision it has been the practice of this country, and, so far as I know, of the European States and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found; and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable. The remedy *in personam* may also exist, and we know that in this country it is frequently resorted to where the parties are resident in England."

On behalf of the American Consul and of the Augusta, it has been said that, under existing arrangements between France and the United States, if the Consuls have not power to decide such a dispute as the present, evidence at least may be taken by the respective Consuls here for the purpose

(t) Swabey R. 215, 217, (u) Ibid 300. (v) Swabey R. 435.

1873. of proceedings, which may hereafter be had in either of
 BARDOT those countries with respect to the collision; and Treaties *
 v. of 1788 and 1853 between France and the United States
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* NOTE :—The passages in the Convention, signed at Versailles on the 14th November 1788, between France and the United States, which were mentioned, were :—

“Article VI.—The Consuls and Vice-Consuls” (of the respective countries) “respectively shall receive the declarations, protests, and reports of all captains and masters of their respective nation, on account of average losses sustained at sea; and these captains and masters shall lodge, in the Chancery of the said Consuls and Vice-Consuls, the acts which they may have made in other ports on account of the accidents which may have happened to them on their voyage. If a subject of the Most Christian King and a citizen of the United States, or a foreigner, are interested in the said cargo, the average shall be settled by the tribunals of the country, and not by the Consuls or Vice-Consuls; but when only the subjects or citizens of their own nation shall be interested, the respective Consuls or Vice-Consuls shall appoint skilful persons to settle the damage and average.”

“Article XII.—All differences and suits between the subjects of the Most Christian King in the United States or between the citizens of the United States within the dominions of the Most Christian King, and particularly all disputes relative to the wages and terms of engagement of the crews of the respective vessels, and all differences of whatever nature they be, which may arise between the privates of the said crews, or between any of them and their captains, or between the captains of different vessels of their nation, shall be determined by the respective Consuls and Vice-Consuls, either by a reference to arbitrators, or by a summary judgment, and without costs. No officer of the country, civil or military, shall interfere therein, or take any part whatever in the matter; and the appeals from the said Consular sentences shall be carried before the tribunals of France, or of the United States, to whom it may appertain to take cognizance thereof.”

“Article XIII.—The general utility of commerce having caused to be established within the dominions of the Most Christian King, particular tribunals and forms for expediting the decision of commercial affairs, the merchants of the United States shall enjoy the benefit of these establishments; and the Congress of the United States will provide, in the manner most conformable to its laws, for the establishment of equivalent advantages in favour of the French merchants, for the prompt despatch and decision of affairs of the same nature.”

have been referred to on both points. It has been further said that the Master of the "Augusta" has furnished to the Master of the "Antares" the names and addresses of the owners of the "Augusta," so that they may be sued in America. We find nothing whatever in the Treaties to debar the "Antares" from proceeding in a British Court of Admiralty. The first

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"Article XVI.—The present Convention shall be in full force during the term of twelve years, to be counted from the day of the exchange of ratifications, which shall be given in proper form, and exchanged on both sides within the space of one year, or sooner if possible."—*Traites de la France par De Clercq*, Vol. I., pp. 197, 200.

The passages in the Convention, concluded between France and the United States on the 23rd February 1853, which were mentioned, were :—

"Article VI.—The Consuls-General, Consuls, Vice-Consuls or Consular Agents, shall have the right of taking at their offices or bureaux, at the domicile of the parties concerned or on board ship, the declarations of captains, crews, passengers, merchants or citizens of their country, and of executing there all requisite papers. The respective Consuls-General, Consuls, Vice-Consuls or Consular Agents shall have also the right to receive at their offices or bureaux, conformably to the laws and regulations of their country, all acts of agreement executed between the citizens of their own country, and the citizens and inhabitants of the country in which they reside, and even all such acts between the latter; provided that these acts relate to property situated, or to business to be transacted in the territory of the nation to which the Consul or the Agent before whom they are executed belong. Copies of such papers, duly authenticated by the Consuls-General, Consuls, Vice-Consuls, or Consular Agents, and sealed with the official seal of their Consulate or Consular Agency, shall be admitted in courts of justice throughout the United States and France in like manner as the originals."

"Article X.—The respective Consuls-General, Vice-Consuls, or Consular Agents, shall receive the declarations, protests, and reports of all captains of vessels of their nation in reference to injuries experienced at sea; they shall examine and take note of the stowage; and when there are no stipulations to the contrary between the owners, freighters, or insurers, they shall be charged with the repairs. If any inhabitant of the country in which the Consuls reside, or citizens of a third nation, are interested in the matter, and the parties cannot agree, the competent local authority shall decide."—*Traites de la France par De Clercq*, Vol. VI., pp. 292, 294.

1873. and obvious remark to be made as to the treaty of 1788;
BARDOT is that it would appear to have expired many years ago.
v. It was, as shown by the 16th article, made for twelve
THE years only from the exchange of ratifications, which, it was
AUGUSTA. stipulated, should take place within a year from the time
of signature of the treaty. Even if this treaty were still
in force, it would not affect the sustainability of the present
suit. The 6th article would rather seem to apply to average
losses and the damage connected therewith only. The
12th article applies only to differences, suits, &c., arising
in France or in the United States, which French Consuls
are to decide between Frenchmen, and American Consuls
between Americans; but that article does not appear to
make any provision for the settlement of differences be-
tween a Frenchman on one side and an American on the
other. The 13th article has manifestly no bearing on a
suit in any country other than France or the United States.
The 6th article of the Treaty of 1853 enables French and
American Consuls to receive declarations made by captains,
crews, and other citizens of their respective countries, and
provides that copies thereof shall be admitted in Courts of
Justice throughout the United States and France in like
manner as the originals, but is silent as to the extent to
which the latter shall be admissible, and as to their efficacy,
if admitted. The 10th article of the same treaty autho-
rizes American and French Consuls, respectively, to receive
declarations, protests, and reports of captains of vessels of
their nation in reference to injuries experienced at sea, and,
in the event of there not being any stipulation to the con-
trary, to take charge of the repairs, but provides that if any
inhabitant of the country in which the Consuls reside, or
citizens of a third nation, are interested in the matter, and
the parties cannot agree, the competent local authority shall
decide. That article does not purport to give such Consuls
power to award damages for collision between American
and French ships, or enable them to enforce in any country
other than France or America their decisions as to repairs,

either *in rem* or *in personam*; and it would seem very questionable whether it means more than that, in the absence of any stipulation to the contrary, an American Consul may interfere as to repairs in disputes between Americans, and a French Consul may do so between Frenchmen. It makes no express provision as to the interference of either French or American Consuls in a dispute as to repairs between French subjects on the one side and Americans on the other, or for the very probable case of a difference of opinion between those Consuls. It is most vaguely penned and its scope doubtful. Assuming, however, that the French and American Consuls here might, jointly or severally, have taken the depositions of the witnesses of the collision in the present instance, and that those depositions or copies of them might have been used in a suit brought in France or America either *in personam* or *in rem*, we do not see any reason in such an authority on the part of the Consuls for preventing the "Antares" from suing in a British Court of Admiralty, or why she should not be permitted to seize the first and most favourable opportunity of enforcing her lien for damage against the "Augusta," if the latter were in fault. So far from the practicability of taking evidence here for actions to be brought elsewhere being sufficient to induce the Court to exercise its option if it have any, to refuse to entertain this suit *in rem*, it is clear that even the actual pendency elsewhere of a suit, against the owners only, would not be sufficient. In *The Bold Buccleugh* (w) the Privy Council held that the pendency of a suit *in personam* in Scotland was no bar to the right of the owners of the injured vessel to proceed *in rem* in England. How, too, can this Court, or the Master of the "Antares," tell whether the owners of the "Augusta" are solvent. Could he justify himself to his owners if, while endeavouring to ascertain how that may be, he were to allow the substantial security, the vessel alleged to be in fault, to elude his grasp? Were

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(w) 7 Moo. P. C. C. 267, 286.

1873. he to do so, he might find it a matter of extreme difficulty
BARDOT and expense, if not an impossibility, again to fasten upon
v. her either in France or America.
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It is unnecessary for us to express, and we refrain from expressing, any opinion on the question whether this Court has a discretion as to the entertainment of a suit, such as the present, in respect of a collision on the high seas between two foreign vessels. We have already stated that we have not any doubt as to our jurisdiction by maritime law to adjudicate in such a suit, and we are quite satisfied that even if it be discretionary and not compulsory upon us to entertain it, we ought to exercise that discretion in favour of the plaintiffs by permitting them to proceed with the suit. Accordingly, we refuse the motion to discharge the warrant of arrest, and direct the costs of that motion to be costs in the cause.

Subsequently, the cause was heard on the merits by Sir Charles Sargent, J., and Green, J. The hearing lasted seven days; and on the 3rd day of May 1873 the Court, being of opinion that the "Augusta" was in the wrong, made a decree for the plaintiffs for Rs. 78,400 and all costs.

This decree was subsequently reviewed on the 8th of September 1873, and the amount of the decree reduced to Rs. 73,088.

Attorneys for the plaintiffs: *Dallas and Lynch.*

Attorneys for the defendant: *Jefferson and Payne.*

[APPELLATE CIVIL JURISDICTION.]

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March 20, 31;
April 29.

*Special Appeal No. 382 of 1872.*VA'SUDEV BHAT *Appellant.*VENKATESH SANBHA'V *Respondent.*

Joint Hindu family—Alienation—Partition—Execution—Voluntary Payment—Consideration—Moral obligation—Request.

It is settled law in the Presidency of Bombay, that one of several parceners in a Hindu undivided family may, without the assent of his coparceners, sell, mortgage, or otherwise alienate, for valuable consideration, his share in the undivided family estate, moveable or immovable.

It is also settled law in the same Presidency that a share in the undivided estate of a Hindu family may be taken in execution, under a judgment against the parcener to whom such share belongs, at the suit of his personal creditor.

Where a Hindu parcener voluntarily advanced money to his brother and coparcener, for the purpose of his defence against a charge of forgery, without any previous request, and merely to save the reputation of the family, the obligation, being no more than a moral obligation, was held not to be a sufficient consideration to support an assignment to the former by the latter of his share in the undivided family estate.

IN this special appeal, which was argued upon the 20th and 31st of March 1873 before Westropp, C.J., and Melvill, J., the facts are sufficiently stated in the judgment of the Court delivered on the 29th April in the same year.

Shámráv Vithal for the special appellant :—Writers upon Hindu law do not include, amongst the outlays, enumerated by them as valid charges upon the estate of an undivided Hindu family, the cost of the defence of one of the co-parceners indicted for a criminal offence: 1 Stra. H. L. 166, 167, 224; Stokes H. L. 261, 262. The monies, advanced by the first defendant, Vásudev Bhat, to the second defendant, Munjónáth Bhat, for that purpose, not being so chargeable, the law will imply a promise by the second de-

1873. fendant to repay these monies to the first. That promise, so long as it remained unperformed, would render the sum (Rs. 3,500) so advanced a debt, which debt would be a good consideration for the deed of the 1st March 1868 (Exhibit No. IX.) : Leake on Contracts, page 26 ; Story on Contracts, page 561, Sec. 456. That deed, being of earlier date than the plaintiff's execution, would have priority over the latter. Again, the Hindu law prohibits one of several parceners from alienating his share previously to partition : Miták. Ch. 1. Sec. I. pl. 30 ; *Gangubai v. Ramana (a)*, *Sadabart Prasad Sahu v. Foolbash Koer (b)*, *Haunman Dutt Roy v. Kishen Kishore Narayan Sing (c)*, except to a member of the family, the principle being that one member has no right to force upon the other members of the family a stranger as a coparcener. And, as a legitimate consequence of that proposition, an undivided share of Hindu family estate cannot be taken in execution, for, if it were, there would be an alienation to the purchaser under the attachment, and thus a stranger might be forced upon other members of the family. The plaintiff's attachment was, therefore, rightly set aside. He could not recover his claim against the family property.

Shántarám Náráyan for the respondent :—The District Judge has found that there was not any previous request from the second defendant to the first defendant to advance the Rs. 3,500, and the Court will not imply a promise by the latter to repay that sum to the former. It was an advance confessedly made by the first defendant to the 2nd defendant to save the family reputation, and not on the credit of the latter. Exhibit No. IX. was not a transfer by the second defendant to the family at large, or in trust for them, but to the 1st defendant individually. The lists given by Strange and others, of charges which the family at large should bear, are not exhaustive. The 2nd defendant, having been acquitted of the offences laid against him, must be regarded as innocent of them. It was right and for the benefit of the family that they should establish his innocence,

(a) 3 Bom. H. C. Rep. 66. A. C. J. (b) 3 Beng. L. Rep. 31 F. B.

(c) 8 Beng. L. Rep. 358 F. B.

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and so protect the reputation of the family at large. The first defendant properly so applied the Rs. 3,500, and was not, nor was the family, entitled to treat that sum as a debt due by the 2nd defendant. The advance was voluntary, no action would lie to recover it: *Lampleigh v. Braithwaite* (d). Hence there was not any debt, and, therefore, not any consideration for the deed of assignment (Exhibit No. IX.,) to the first defendant, and it is fraudulent and void against a creditor. *Twyne's case* (e), Mayukha, Chap. IX., pl. 2. 10.

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Secondly—At this side of India and in Madras, a parcener may, before partition, assign his share for valuable consideration: *Gundo v. Rambhat* (f); *Damodhar Vithal v. Damodhar Huri* (g); *Tukaram v. Ramchandra* (h); *Virasvami Grámini v. Ayyasvámí Grámini* (i); *Palanivelappa v. Mannaru* (j). The case cited for the appellant from 3 Bombay H. C. Rep. 66 (*Gangubai v. Rámanná*), was an alienation by gift, and not for valuable consideration. The Calcutta cases, which have been quoted, are inapplicable here.

Shámráv Vithal was heard in reply.

Cur. ad. vult.

WESTROP, C.J.:—This suit was brought, in the Court of the Subordinate Judge at Coompta, by the respondent, Venkatesh Sanbháv, against the appellant, Vásudev Bhat, and his brother Munjnáth Bhat, to set aside an order made, we presume, under Section 246 of the Civil Procedure Code, raising an attachment obtained by the plaintiff (under a decree in a suit brought by him against the present second defendant, Munjnáth Bhat,) against three houses, to an undivided share in which Munjnáth Bhat was entitled, but which the plaintiff alleged to have been, by deed (Exhibit 9), executed shortly before the attachment, fraudulently and collusively assigned by that defendant to his brother, the first defendant, Vásudev Bhat.

(d) 1 Sm. L. C. 139 5th Ed.

(e) 1 Sm. L. C. 1.

(f) 1 Bom. H. C. Rep. 39.

(g) Ibid. 182.

(h) 6 Bom. H. C. Rep. 247. A. C.J.

(i) 1 Mad. H. C. Rep. 471.

(j) 2 Mad. H. C. Rep. 416.

1873. The first defendant, by his written statement, relied on
 VA'SUDEV Exhibit 9 as a *bonâ fide* deed of sale to him by the second
 BHAT defendant in consideration of Rs. 3,500 previously advanced
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The second defendant also alleged that the deed of sale was executed *bonâ fide*, that the Rs. 3,500 had been advanced to him *at his request* by the first defendant for the purpose of enabling him to obtain his release from imprisonment, in respect of transactions relating to land exclusively belonging to himself, and that he had, for some years, been separated from the family, of which he and the first defendant were members.

The Subordinate Judge, being of opinion that the deed of sale was insufficiently stamped, rejected it, and made a decree for the plaintiff.

The first defendant appealed to Mr. Spens, the District Judge of Canara, who held that the deed was sufficiently stamped, but was fraudulent; and he, accordingly, on that ground, affirmed the decree of the Subordinate Judge.

The first defendant has now made a special appeal to this Court, in disposing of which we must accept the following facts as found by the District Judge, viz., that both of the defendants were, at the time of the execution of the deed of sale (Exhibit No. 9), members of an undivided family, and that the sum of Rs. 3,500, asserted to be the consideration for the deed, was voluntarily paid by the first defendant to the second defendant without any previous request from the latter, but "merely to save the reputation of the family" by enabling him to defend himself against a charge of forgery, in respect of which he had been committed for trial before the Sessions Court. The first defendant was not present either at the execution or registration of the deed. Finally, the District Judge found that the "second defendant in collusion with the 1st defendant" executed the deed of sale "in order to defraud creditors from whom he (the second defendant) had personally borrowed money."

It was argued before us that for two reasons the decree of the District Judge is erroneous—1st—that the family property, or any share in it, cannot, for the separate debt of one of several coparceners in an undivided Hindu family, be lawfully taken in execution, and thus alienated previously to partition; 2nd—that the sum of Rs. 3,500, having been actually paid by the first to the second defendant for his personal benefit only, was not properly chargeable against the family at large, and hence that the law would imply a promise by the second defendant to repay it, and that accordingly it became a debt due by him to the first defendant, and was a valuable consideration for the deed.

With respect to the first point, as a preliminary remark, we should observe, that neither Bombay Regulation IV. of 1827, nor its substitute, the Civil Procedure Code, contains any exemption of a share in undivided property from liability to attachment and sale.

The objection, contained in the first point, has been rested upon the assumed inalienability of the share of a member of a Hindu family in the undivided estate belonging to the family without the assent of his co-parceners.

In Macnaghten's Hindu Law, Vol. 1, p. 5, it is stated that "a co-parcener is prohibited from disposing of his own share of joint ancestral property; and such an act, where the doctrine of the Mitákshará prevails (which does not recognize any several right until after partition, or the principle of *factum valet*,) would undoubtedly be both illegal and invalid. But according to the Dáyabhága, which recognizes this principle, and also a several though unascertained right in each co-parcener, even before partition, a sale, or other transfer, under such circumstances, would be valid and binding as far as concerned the share of the transferring party." This latter doctrine Sir William Macnaghten states to be the rule of Hindu Law in Bengal, and he instances two cases in 3 S. D. A. Rep. pp. 17 and 138, as exemplifying that rule—both of which were cases of gift, not of sale. In the

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course of his criticism upon another case, reported in the same volume, p. 2, Sir William Macnaghten, with respect to the third reason there assigned by the Pandits for their opinion, which reason was "that a co-heir may dispose of his own share of undivided property," observes "that his right to do so is admitted; but this does not include his right to alienate the shares of others." He also refers to the notes of Mr. Colebrooke at pp. 47 and 117 of 1. S. D. A. Rep. as supporting the Bengal rule. In Macnaghten's note given in *Doc d. Gunganarain v. Bonerjee (k)*, it is said that "if one of four brothers make a deed of sale of the whole patrimonial property, it will hold good as far as his share is concerned." And in another case Colville, C.J., (Boulnois 228) says: "On the death of an original co-sharer, his heirs stand in his place, and succeed to his rights, as they stand at his death, his rights may also in his lifetime pass to strangers either by alienation, or, as in the case of creditors, by operation of law; but in all cases those, who come in the place of the original co-sharer by inheritance, assignment, or operation of law, can take only his rights, as they stand, including of course the right to call for a partition."

Macnaghten (Vol. I. H. L. pp. 5, 6), in illustration of the more strict doctrine against alienation, which some schools of Hindu Law hold the Mitákshará to justify, mentions the instance of a deed of *gift* in Behar (Mithila), which was held invalid even to the extent of the donor's own share (l). Other instances, to the same effect, of the Mithila doctrine are to be found in 4 S. D. A. Rep. 158, 160, 330; 5 Ibid. 24, 163, 202; 6. Ibid 176.

The passages in the Mitákshará on Inheritance, from which this doctrine has been drawn, are in Chap. I, Sec I, placita 27 to 30 inclusive (Colebrooke's Trans. pp. 256, 257). Of these, placitum 30 is that most relied upon. There the

(k) East's Notes; 2 Morley Dig. 152, 155.

(l) 3 S. D. A. Rep. 232 and see. pp. 144, 145.

author, explaining the following passage from Vrihaspati as cited in the Ratnākara: "Separated kinsmen, as those who are unseparated, are equal in respect of immoveables; for one has not power over the whole to make a gift, sale, or mortgage"—says it must be thus interpreted—"among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common; but, among separated kindred the consent of all tends to the facility of the transaction, by obviating any future doubt, whether they be separate or united; it is not required, on account of any want of sufficient power, in the single owner; and the transaction is consequently valid even without the consent of separated kinsmen." The doctrine of the Mayukha, as stated in Chap. IV., S. VII., pl. 36, 37, 38, does not seem materially to vary from that of the Mitāksharā, but in the same chapter, Section I, pl. 6, it is admitted that ownership is acquired by co-parceners by birth, and their respective shares only ascertained by partition; so that a sale by a co-parcener of his share before partition could not, according to the Mayukha, be regarded as a sale without ownership. The value of this remark will be seen when we refer to the arguments used by those writers who maintain the right of a co-parcener to alienate his share before partition. See also Smṛiti Chandrikā (Chap. VII. pl. 56, Chap. XV. pl. 1, Iyer's trans: pp. 91, 236), which agrees with the Mitāksharā.

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Mr. Colebrooke, however, who stood first amongst the authorities on Hindu Law, writing, with a full knowledge of those passages, to Sir Thomas Strange, upon a Madras case, *Sashachella Pillay v. Ramasamy* (m), said: "On the subject of the question, which you had lately before you, I entirely agree with you, that a mortgage, sale, or gift, by one of several joint-owners, without the consent of the rest, is invalid for *others*'

(m) 2 Madras Notes of Ca. 234, 240

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shares. In Bengal law, it is clear, that it is good for his own share and for that only. In other provinces, it is as clear that the act is invalid, as it concerns others' shares; and the only doubt, which the subtlety of Hindu reasoning might raise, would be, whether it be maintainable even for his own share, of undivided property. On the two first points, then, as stated by you, the law is undoubtedly as you have viewed it. On the third point, I take the law to be that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor; and that an unauthorized alienation by one of the sharers is invalid, beyond the alienor's share, as against the alienee" (Appendix to 2 Stra. H. L. p. 344). In the case, as to which Mr. Colebrooke thus wrote, Sir T. Strange held the alienation valid as regarded the alienor's own share, but invalid as regarded that of his co-parcener. As to another Madras case, Mr. Colebrooke said: "See Mitak. on Inheritance, Chap. I., Sec. 1, pl. 30, 32. None can dispose of joint property (especially immoveables) without consent of the sharers." The alienor there had attempted to dispose not merely of his own share in a village, but of the whole village. Mr. Colebrooke continued: "But here the sale appears to have been without authority, general or special. In setting it aside on this ground, equity would require redress to be afforded to the purchaser, by enforcing a partition of the whole, or a sufficient portion of it so as to make amends to the purchaser out of the vendor's estate." Mr. Ellis, as to the same case, said: "The sale is valid only so far as the seller's share in the property extended" (Appendix to 2 Stra. H. L., 349, 350). Sir Thomas Strange (1 Stra. H. L. 200) said: "Accordingly it imports creditors to take notice whether the family, with which they are about to deal or contract, be divided or undivided; and, if the latter, at their peril, to see that the transaction be one, by which the rest of the co-heirs will be concluded; since otherwise, he only with whom it had been entered into, will be answerable for it, and not the common stock.

Such seems to be the result of the decisions referred to below; of which those at Bengal rest upon the highest living authority in Hindu Law, that of Mr. Colebrooke, who upon this point, and with reference to a case at Madras upon which he was consulted, held 'that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor,' observing, in the course of his opinion, 'that the only doubt which the subtlety of Hindu reasoning might raise, would be whether it be maintainable even for his own, the property being undivided.' Such *may be* the construction of a passage in the Mitakshara on the ground of co-ordinate property (Mitak Ch. 1, Sec. 1, pl. 30). But where each parcener is considered to have vested in him during the co-partnership, a several, though unascertained, right, as is the case where the authority of Jimuta Vahana prevails, it is clear that there may be an assignment before partition; the alienee becoming a sort of tenant-in-common with the other parceners, admissible, as such, to his distributive share upon a partition taking place; and even with respect to an alienation of the whole, it would be good for the alienor's share, though for his attempt to dispose of more, unwarranted, he would be liable to penal consequences.' Subsequently, at page 202, Sir T. Strange says: "In favour of a *bonâ-fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due out of the share of him with whom he had dealt; and for this purpose, a court would be warranted in enforcing a partition."

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The Bengal doctrine will be found in the *Dáyabhága*, Chap. II., pl. 27 to 31 (Colebrooke's Translation, pp. 31 to 33; and Stoke's H. L., pp. 205 to 207); and in the *Dáya Krama Sangraha*, Chap. XI., pl. 1 to 9, the author of which (Śrī Krishna) strongly maintains the right of an unseparated co-parcener to part with his own share either by gift or other mode of alienation.

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In three several parts of the Digest (Colebrooke's Trans., Ed. of 1801) Jagannátha lays it down in positive terms that, although an alienation by a parcener, without the assent of his co-parceners, even of his own share, is a moral offence, yet it is legally valid, and he denies that such a transaction is a sale without ownership—1 Dig., p. 455 (Bk. II., Chap. II., pl. 6) ; 2 Dig., pp. 98 to 105 (Bk. II., Chap. IV., pl. 4, 5, and 6) where he quotes the text of Nárada : " If they severally give or sell their own *undivided* shares, they may do what they please with their property of all sorts, for surely they have dominion over their own." The commentator admits that " if a parcener, without the assent of his co-heirs, give the whole joint-property, the gift is null ; for the joint-property of all cannot be divested by the act of one." The expression " null " he, subsequently, limits to the shares of the non-assenting co-parceners. He says of the alienor : " There is nothing to prevent the annulling of his own property, since the gift, which he himself makes with the intention of annulling the rights of all the parceners in that chattel, is the act of an owner, of whom property is predicable. Consequently, the ownership of the giver appears in this instance to be alienable ; but the ownership of the rest subsists in *full force*. The meaning of ancient authors, who hold a gift of joint property to be void, is the same. But a parcener's gift of his own share is valid. All the brothers have each their respective predicable property in all the effects." And, again, he says : " joint property is wealth belonging to more than one owner. Misra says : ' the gift is invalid, because a man has not full dominion over joint property, a wife or a son ; and the want of dominion, in the other instance, is deduced from the same reasoning, which proves it in the case of joint property.' By ' the same reasoning ' he means that the ownership of one cannot be annulled by another. From Misra's exposition it is inferred that a parcener's gift of his own share of undivided property is void. But to reconcile the two opinions of different authors" (Nárada and Váchaspati Misra we

presume), "we adopt the sense inferrible by reasoning, and say a gift of the whole joint property is void, not a gift of the parcener's own share. Thus, the donor cannot, at his own choice, annul the ownership of others; but he is not debarred from aliening his own single right in the joint property; for such acts by partners in trade are often seen in common practice. This may be stated as the opinion of Váchaspati Bháttachárya and Vijnyaneshwar. Therefore the gift is valid as far as the donor's share is concerned; but he shall be punished, and must perform penance. Such is the rule ordained concerning gift or other alienation of what may not be given. 'That a thing may not be given' denotes that the gift is attended with sin; for this form of speech bears the sense of the imperative. It does not denote that the gift is a void act; were it so, it would not differ from a void donation; and full dominion would not be noticed under this title of 'what may not be given.' If it be said this title is intended to show punishment for such gifts, it is answered, this form of prohibition implying offence, the offender should be punished. Thus the gift of things, which are enumerated among those which may not be given, is punishable; gifts enumerated among those which are void are utterly null; and those noticed under both heads are both void and punishable; as the gift of a deposit, or the like, of *another's* share in undivided property and so forth." See also Jagannátha's comment on another text from Nárada to the same effect—3 Dig., 430, 431 (Bk. V., Chapter VII., pl. CCCXC.).

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The opinion of Váchaspati Misra (Bhattáchárya), referred to and explained by Jagannátha, is probably that expressed in the Viváda Chintámani, pp. 72, 73, 75, 76 (Tagore's Translation). By his reference to Vijnyaneshwara, the author of the Mitákshará, Jagannáth shows that he would similarly explain the passages in the Mitákshará relating to the alienation of joint property. But Mr. Colebrooke (Appendix, 2 Stra. H. L. 432, 433), after referring to the Smriti Chan-

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driká of Devanda Bhatta, observed : " Neither this author nor any other of the same school, so far as I can find, takes the distinction which those of the Bengal school assume between gifts exceeding or not exceeding the giver's own share, and between void donations and unfit gifts. Lawyers of Bengal hold that an unfit gift (*adeya*), to which class this of undivided property belongs, is immoral, and even punishable, but not void, nor voidable ; while one of the other class, termed void donation (*adatta*), is null, and also punishable. The Mitakshara of Vijnyaneshwara makes no such distinction nor exception, though the author explains unfit gifts as comprising, 1st, such as are not fit to be given for want of proprietary right ; and, 2ndly, such as may not be given by reason of an express prohibition. I am entirely at a loss to conceive on what grounds Jagannatha asserts in his Digest (Vol. 2, p. 105) that his mode of reconciling the discordant opinions of authors, by maintaining the co-heir's alienation of joint-property to the extent of his own share in it, is consistent with the opinion of Vijnyaneshwara. The alienation of joint-property is comprehended in this author's class of gifts unfit, because they are prohibited ; and the only distinction that seems fairly deducible from his doctrine, is that gifts unfit, by reason of the want of proprietary right are necessarily null and void ; but that gifts unfit, because they are prohibited by general rules, may be valid under the exceptions which the law allows, such as distress, necessary support of the family, and pious purposes arising from indispensable duties (Mitak. on Inh. ; Chap. I., Sec. I., pl. 29)." The next observations of Mr. Colebrooke are of great importance, and, no doubt, have much influenced the Madras and Bombay Courts in taking the course which they have adopted. He continued thus : " It may be objected to Vijnyaneshwara and the Smṛiti-Chandrika, that the tests, which prohibit gifts of any portion of joint-property, or of the whole of a man's sole property, thereby distressing his family, equally forbid sale and mortgage of it ; so that these also would be void,

although a valuable consideration have been paid and received. Injury and injustice may, however, be prevented by holding him and his property answerable for the repayment of the money or valuable consideration received by him; and equity, perhaps, would award partition, for the purpose of enforcing payment from his share, thus rendered a separate one." (Here Sir T. Strange refers by a footnote to the passage in his work already quoted from Vol. 1, p. 202.) Mr. Colebrooke continued: "But in the case of a gratuitous alienation, there are not the same difficulties; and I apprehend that under the Hindu law, as received among those with whom the Mitakshara and Smriti Chandrika are the chief authorities, it must be held that the disposal by will (considered as gift) of an undivided share of joint-property is not valid; nor of any part of it, unless for pious purposes, or other uses incumbent on the testator to provide for, and falling within the exception which the law makes to the general prohibition." As to gift see also, Stra. H. L. 261.

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The High Court of Madras has adopted the views of Mr. Colebrooke, Mr. Ellis, and Sir Thomas Strange (and the decision of the latter at Madras in *Sashachella Pillay v. Ramasamy* already mentioned by us) as to the validity of an alienation, for valuable consideration, of the share of one of several co-parceners in a Hindu undivided family.

In *Virasvāmi Grāmini v. Ayyasvāmi Grāmini* (n), Sir C. Scotland, C.J., and Bittleston, J., held, at the Original Jurisdiction side, that one member of an undivided family may alien his share of the family property, and that there may be a valid sale of such a share upon an execution in an action of damages for a tort. The judgment, there delivered, shows that the Supreme Court and the S. D. Adawlut respectively of Madras had acted upon the same doctrine. Frere and Holloway, J.J., in *Palanivelappa v. Mannaru* (o), held that a sale by a father is valid by Hindu law to the extent of his own share of the undivided estate, and that

(n) 1 Mad. H. C. Rep. 471.

(o) 2 Mad. H. C. Rep. 416.

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according to the Madras school there is no distinction in this respect between a father and other co-parceners. In their judgment, they say: "The principle, upon which, following the suggestion of Sir Thomas Strange and Mr. Colebrooke, the Courts have of late years satisfied the contract of one individual member out of the share which would have come to him on partition, is that as the co-parcener has contracted he ought to fulfil his contract, that if he could, if disposed, at any time, according to the Madras School, enforce a partition, it is only just that when he has incurred an obligation, he shall not be allowed to escape its effects by the allegation that his own deed was *ultra vires*; but compelled to give to his creditor all the remedies to which he would himself be entitled as against the object matter of his agreement."

The Mithilá and Benares Schools, however, interpret the Vivada Chintámani and the Mitákshará as declaring the invalidity of alienation, for valuable consideration, even of his own share, by one parcener without the assent of the others. Upon that view, the High Court at Calcutta (following several previous decisions of the Calcutta Sudder Dewanee Adawlut, and one in the N.-W. Provinces,) has acted in cases coming before it, in its appellate jurisdiction, from provinces where the law of the Mitákshará prevails.—*Cosserat v. Sudaburt Pershad Sahoo* (p), *Sudaburt Prasad Sahu v. Foolbash Koer* (q), and *Haunman Dutt Roy v. Kishen Kishor Narayan Sing* (r), both of which last decisions were made by a Full Bench. Sir B. Peacock, referring to the previous decisions upon that question at that side of India, and to the well-known passage in the judgment of the Privy Council in *Appovier v. Rama Subha Aiyar* (s), said, in *Sulaburt Prasad Saha v. Foolbash Koer* (t): "We are called upon to decide this case according to the Mitakshara law as

(p) 3 Calc. W. Rep. 210.

(q) 3 Beng. L. Rep. 31 F. B.

(r) 8 Beng. L. Rep. 358.

(s) 11 Moo. Ind. App. 75.

(t) 3 Beng. L. Rep. 45 F. B.

we find it, and not according to our own views of policy. Whatever our opinions might be, in the absence of the decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by over-ruling the current of authorities, by which, for nearly half a century, the law appears to have been settled, and in accordance with the principles of which it appears to have been generally understood and acted upon," and held accordingly that one parcener "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint-family-property, in order to raise money on his own account, and not for the benefit of the family."

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In the same case (p. 36), he said: "It may be that the law does not make any difference as to the liability of the property to satisfy the debts of the deceased, whether it passes to heirs by inheritance, or to survivors by survivorship; and that the survivors take it charged with the debts of the deceased, in the event of his having no other assets. I express no opinion upon that point. It is stated in the Treatise of Yajnavalkya (I am not reading now from the Law of Inheritance, but from that part of the work of the author which treats of the payment of debts, published by Mr. Roer and Mr. Montriou), in text No. 51: 'He who takes the property of one who leaves no (capable) son, shall pay the debts,' that is, the debts of the deceased; 'so he who takes, or marries the widow; also that son whose personal estate no other has appropriated, and who in such case shall always be deemed fit to inherit property,' that is to say, he who marries the widow is also liable to pay the debts out of the assets which would have been available if he had not married her. Also he says, 'if one die without any son, then whosoever succeeds to the property.' According to this doctrine, whosoever succeeds to the property is liable to the extent of that property to pay the debts. I express no opinion upon the subject, because the case has not been argued, and does not arise in the present suit."

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That latter point, as to the liability of a parcener's share in an undivided estate to be taken in execution for the private debt of that parcener, thus touched, but not decided by Sir B. Peacock, as already observed, directly arises in this case. Such a liability may be regarded as a corollary to the proposition that a parcener may alienate his share independently of the consent of his fellow parceners. It is observable that the appellant, who denies the liability of the share of the second defendant in the family estate to execution, puts forward and relies upon the deed of sale to himself by the same parcener—a position apparently involving some inconsistency, but which he explains by saying that one member may relinquish his share in favour of the other members of the family or any one of them, but not in favour of a stranger.

Previously to adverting to the Bombay authorities, we may notice that in a recent case before the Privy Council from Oude, *Syud Tuffuzzool v. Rughoonath Pershad (u)*, Lord Justice James, in giving the judgment of their Lordships and speaking of a share in undivided Hindu property, said: "Mr. Leith referred in his argument to the family property of Hindus, and urged that such a share in such property may be attached and sold in execution. No doubt that such a share is property and that a decree-holder can reach it. It is specific, existing, and definite; but it is not properly the subject of seizure under this particular process, but rather by process direct against the owner of it, whether by seizure or sequestration, or appointment of a receiver. In the present case the attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future award, as to which it is wholly uncertain, until the award be made, to what the debtor will be entitled."

As a general proposition, it is true that, in this Presidency, the Mitákshará, where not differing from the Mayukha, is usually followed by the courts upon questions of Hindu Law.

(u) 14 Moo. Ind. App. 40

But this rule is not invariable. The Courts have, in some instances, declined to follow either of those works. The doctrine of Mr. Colebrooke, Mr. Ellis, and Sir Thomas Strange, as to the right of alienation for valuable consideration by one of several coparceners of his share in undivided Hindu family estate without the assent of the others, has been here preferred to that of the Mithilá and Benares Schools; and, as a logical consequence of that doctrine, the Courts have recognized the right of a judgment creditor to take in execution, for the private debt of a parcener, his share in such undivided property.

Steele, who is an authority in this Presidency, seems, at p. 210 of his work, 1st Ed., to take much the same view of alienation as Strange and Colebrooke. He treats the consent of the other members of an undivided Hindu family as necessary to the validation of an alienation by the manager, or an individual member of the family, except where such alienation is indispensable for the support or is for the benefit of the family; but he would appear to refer there to alienations of the interest of the members at large of the family in the whole or a part of the property, and to be of opinion that any one parcener may sell his own share, for he subsequently in the same page says: "Descended property is considered entailed, but one of several may alienate his own share." But *vide ibid* p. 66, pl. 66, 1st. Ed.

We have succeeded in finding only one case, amongst the reports of cases in this Presidency, in which the non-alienability of a parcener's share was maintained. That is *Ballojee v. Venkappa* (v) in which, it must be observed, that both the Munsif of Poona and the Zilla Judge upheld the mortgage in dispute. Intermediately between their decrees, the Assistant Judge had, on grounds not affecting the general question of a parcener's right of alienation of his own share, made a decree unfavourable to the mortgagee. On an appeal to the Sudder Adawlut, that Court in 1839

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1873. reversed the Zillah Judge's decree in favour of the mortgagee, and held that the mortgagor had not power even to mortgage his own share of the family property. This ruling was arrived at upon a not very lucid opinion (as reported) of the Shástri, and, moreover, *ex parte*, inasmuch as the defendant, the mortgagee, did not appear on the special appeal, and there was not any argument addressed to the Court on his behalf. There are accordingly reasons why that case, standing as it does alone, is not entitled to much weight.

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In subsequent cases, it appears that the Bombay Sudder Adawlut, although holding that the purchaser of the share of a parcener in Hindu family property cannot, before partition, sue for possession of any particular part of that property, or predicate that it belongs to him exclusively, yet was of opinion that he may maintain a suit for partition, and thus obtain the share which he has purchased: *Sadasew v. Bapooji* (w), *Jiwan v. Gunnoo* (x).

The High Court at its appellate side (Kinloch Forbes and Tucker, JJ.) held in *Gundo v. Rámabhat* (y), that a member of a Hindu undivided family may mortgage his own share of the family estate, and that, if he were acting as manager of the undivided family, he may mortgage the shares of the other members of the family on any common family necessity, or for the general benefit and use of the family. The right of one member of an undivided Hindu family to sell his own share was maintained by Kinloch Forbes and Erskine, JJ., in *Dámódhar Vithul v. Dámódhar Hari* (z).

In *Tukárám v. Rámchandra* (aa) Melvill and Warden, JJ., in 1869, held distinctly that, at this side of India, a member of an undivided Hindu family can, without the consent of his coparceners, sell his share in the undivided property. They distinguished the case of a sale, as that was, from the case of

(w) 4 Morris S. D. A. Rep. 145. (x) 9 Harr: S. D. A. Rep. 555.

(y) 1 Bom. H. C. Rep. 39. (z) Ibid. p. 182.

(aa) 6 Bom. H. C. Rep. A. C. J., 247.

a gift, which, in *Gangubái v. Rámanná* (b), it was held that a Hindu parcener could not make gift of his share in undivided property without the consent of his coparceners. The case of a gift (either testamentary or *inter vivos*) is clearly different from that of a transfer or charge made for valuable consideration; and we have already seen that Mr. Colebrooke distinguishes the former from the latter. We are not aware of any instance, at this side of India, in which, without the consent of the heirs, a testamentary gift of the share of a parcener in undivided property has been upheld.* I have frequently refused to recognize such devises, and am aware that other Judges have pursued the same course.

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During the nineteen years and upwards of my acquaintance with the Island of Bombay, I can affirm that the right of a parcener to sell, mortgage or otherwise alien, for valuable consideration, his share of Hindu undivided property, has uniformly been recognized in that Island, originally in the Supreme Court, and, since its abolition, in the High Court at its original jurisdiction side; and according to the tradition, which existed amongst the senior members of the Legal Profession whom I found here in 1854, that doctrine had been acted upon in this Island from a time anterior to the opening of the Supreme Court in 1824.

In accordance with that tradition was the decision in *Maccundass v. Gunpatrao* (c), where, subject to the claims which other members might have on the undivided family estate, the right of one member to mortgage his share was recognized and that of the mortgagee to maintain a suit against the other coparceners for partition.

The partition of the estate of Pránjivandás Kahándás by the Supreme Court, during the Chief Justiceship of Sir M. Sausse, afforded a strong instance of the same ruling. Pránjivandás Kahándás left a widow, Jethi Vahu, and three sons

* NOTE.—Acc. 2. Borr. R. 7, 515, Reprint of 1862-63.

(b) 3 Bom. H. C. Rep. A. C. J. 66. (c) Perry's Or. Ca. 143.

1873. surviving him, namely, Pránvalabhdás, Parbhudás, and Ichhálál. A fourth son, Hargovind, was born after his death. Pránjivandás Kahándás had made a will in favour of his widow and three elder sons, but it was admitted by all of the parties that the estate being ancestral, such a devise could not deprive the posthumous son, Hargovind, of his right to a fourth share. The widow, Jethi Vahu, waived such claim, if any, as she might have under the will to a share, and accepted a maintenance. On the partition, mortgages severally created by Pránvalabhdás, Parbhudás, and Ichhálál on their respective shares, some of which were in favour of strangers (Parsis) to the family and one or more in favour of the family at large, were severally enforced and carried into effect against the respective shares of the several mortgagors. It may be useful to mention that although the whole family was, for many years, undivided in estate, the three elder sons had, by means of moneys borrowed on their respective shares, traded separately. The eldest, Pránvalabhdás, became insolvent. A bill, filed by the Official Assignee to make the shares of the other co-parceners liable for the trade debts of Pránvalabhdás, was dismissed. A bill, filed by one of his creditors on behalf of himself and the other creditors of Pránvalabhdás for the same purpose, met the same fate.

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We next proceed to mention the authorities here as to the right to take in execution, for his private debt, the share of a parcener in the undivided estate of a Hindu family.

The plaintiff in *Sheochund v. Nihalchund* (d), a suit brought in 1817, did not, by his plaint, venture to deny that his co-parcener's (Dhoolubh's) share was lawfully attached, but sought for exemption of his own share only from attachment.

In *Duyashunker v. Brijvullubh* (e) an attachment against a parcener's share in undivided property, was upheld. The second point there decided, namely, that a sale, made by that

(d) 1 Borr. 329.

(e) Select Ca. S. D. A. 43.

parcener subsequent to the judgment, but before the attachment, was invalid against the judgment crediort, is not now good law. If the sale were for valuable consideration, as would seem to have been the fact, and not merely colourable, although it may have been made with the intention of defeating the judgment creditor, it ought to have been upheld, inasmuch as the judgment before attachment constituted no lien on the property.

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Hurreedass v. Ghirdurdass (f), is another instance of an attachment against a parcener's share in undivided property being upheld. Provision was, however, made that his share should bear a portion of his mother's funeral expenses.

In *Ram and Gunesh Sabashet v. Rugooveer (g)*, the Sudder Dewanee Adawlut upheld an attachment against the share of one of three co-parceners for his private debt, and, after a reference to the Shástri, laid it down that a division of property may be enforced to satisfy a judgment creditor.

In *Sadasheew v. Gunesh and Ram Sabashet (h)*, the same Court permitted an attachment of the whole of the family property, but directed that, on a sale thereof, one third of the proceeds, or so much of such one third as might be necessary, should be paid to the judgment creditor of one of the parceners, and that the remaining two thirds should be paid over to the other two parceners.

The same doctrine was enforced by the same Court in *Mulhar Kundo v. Rowjee and Luximon (i)*, *Devichund v. Yemajee (j)*, *Jejeebhaee v. Jejeebhaee (k)*, *Mbteeram v. Shamjee (l)*, *Bhagoo v. Hunmuntram (m)*.

There is a consistency in that doctrine with the liability of the deceased father's estate in the hands of his sons or

(f) Select Ca. S. D. A. 46.

(g) 1 Morris S. D. A. Rep. 9.

(h) 1 Morris S. D. A. Rep. 18.

(i) 1 Morris S. D. A. Rep. 75.

(j) 3 Morris S. D. A. Rep. 1.

(k) I bid. 146

(l) I bid. 151.

(m) 7 Harrington's S. D. A. Rep. 135.

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others to pay his creditors as laid down in the Mayukha, Chap. 5, Sec. 4, Pl. 14, 16, 17, 19, and in the passage quoted by Sir B. Peacock from the Mitákshará on the payment of debts published by Mr. Roer and Mr. Montrion, text No. 51, abovementioned. We are not, however, to be understood as saying that the liability amounts to a lien (See 9 Bombay H. C. Rep., 116).

On the principle *Stare decisis*, which induced Sir Barnes Peacock and his colleagues strictly to adhere to the anti-alienation doctrine of the Mitákshará in the provinces subject to their jurisdiction where the authority of that treatise prevails, we at this side of India find ourselves compelled to depart from that doctrine, so far as it denies the right of a Hindu parcener, for valuable consideration, to sell, incumber, or otherwise alien his share in undivided family property. The foregoing authorities lead us to the conclusion that it must be regarded as the settled law of this Presidency, not only that one of several co-parceners in a Hindu family may, before partition, and without the assent of his co-parceners, sell, mortgage, or otherwise alien, for valuable consideration, his share in the undivided family estate, moveable or immoveable, but also that such a share may be taken in execution under a judgment against him at the suit of his personal creditor.* Were we to hold otherwise, we should undermine many titles, which rest upon the course of decision, that, for a long period of time, the courts at this side of India have steadily taken. Stability of decision is, in our estimation, of far greater importance than a deviation from the special doctrine of the Mitákshará upon the right of alienation.

It remains for us to dispose of the second point, namely, whether the deed of sale (Exhibit 9) was executed by the 2nd defendant to the 1st defendant for valuable consideration. As already stated by us, we must, on the facts as found by the District Judge, hold that the sum of Rs. 3,500, the alleged

* NOTE.—The same law has been laid down as to Muhammadaus —2 Morris S. D. A. Rep. 99, 276, 284 ; Select Cas. S. D. A. 46.

consideration, was paid voluntarily by the 1st defendant to the 2nd defendant without any previous request from the latter, and "merely to save the reputation of the family." A moral obligation is not a sufficient consideration to uphold a promise: *Eastwood v. Kenyon* (n). The question there arose upon a motion in arrest of judgment, whether the declaration showed a sufficient consideration for the promise. It stated, in effect, that the plaintiff had *voluntarily* acted as guardian and agent for the defendant's wife, while she was a minor and unmarried, and had *voluntarily* expended money for the improvement of her estate, and had obtained money for that purpose by borrowing it upon his promissory note, and that the defendant's wife had received the benefit of the expenditure, and, after she came of age, promised to pay the note. It was argued, for the plaintiff, that the declaration disclosed a sufficient moral consideration to support the promise; but the Court, in a judgment in which all the authorities on the subject were reviewed, refused to acknowledge the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, and held the declaration to be bad, because it stated no consideration, but a past benefit, conferred without the request of the defendant. In commenting upon the doctrine in question, they said: "The doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it. The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied to the prejudice of real creditors." The law is now quite settled in conformity with that judgment, which is highly applicable to this case:

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(n) 11 Ad. & E. 438.

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On these grounds, we affirm the decree of the District Judge with costs, and with a declaration that only the right, title, and interest of the second defendant, Munjnáth Bhat, can be sold under the attachment of the three houses mentioned in the plaint.*

Decree affirmed.

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[APPELLATE CIVIL JURISDICTION.]

June 24.

Special Appeal No. 313 of 1872.

FAKIRA'PA' BIN SATYA'PA'.....*Appellant.*

CHANA'PA' BIN CHANMALA'PA'.....*Respondent.*

Hindu Law—Alienation by a coparcener of his share in the undivided family property.

Held by a Full Bench, following the doctrine laid down in the preceding case, *Vasudev Bhat v. Venkatesh Sanbhav*, that a Hindu parcener may, without the consent of his coparceners, alienate his share in undivided family property.

Tukaram v. Ramchandra (6 Bom. H. C. Rep. A. C. J. 247) approved and adopted.

Bajee v. Pandoorung (Morris Part II. 93) disapproved.

THIS was a special appeal from the decision of Baron Larpent, District Judge of Dharwar, affirming the decree of the Principal Sudr Amin.

Chanápá brought this suit to establish his right to a house purchased by Fakirápá at an auction sale in execution of a decree against the plaintiff's son, Báslingápá. The plaintiff alleged that he had turned out Báslingápá on account of

(o) 8 Q. B. 483.

* See the next case.

misconduct, and that the house in dispute belonged exclusively to himself. Both the Lower Courts decreed in the plaintiff's favour.

On special appeal, GIBBS and KEMBALL, JJ., remanded the case for trial of the issue:—"Whether the plaintiff has proved that he built the house wholly and entirely with his own self-acquired means, irrespective of family resources" with the following remarks:—

"The District Judge has not found sufficient facts to enable this Court to apply the Hindu law to the case. It is necessary that the party, alleging that the house he built was built from his own self-acquired funds, should prove his assertion: *Bái Manchá v. Narotamdas* (a). It is alleged that the site was ancestral; that an old ancestral house was removed. If this be so, it could hardly be said to have been built solely from the self-acquired means of Fakirápá. We think that the only question that arises in the case is whether Baslingápá has a share in the house. He would have a share, if it were ordinary ancestral property; and in accordance with a ruling of this Court, he could dispose of such share, even though no partition of the family estate had been made: *Tukárám v. Rámchandra* (b).

On the District Judge's finding, to the effect that the house was not built by the plaintiff with his own self-acquired means, the Division Court made a reference to the Full Bench with the following remarks:—

"The question decided in the case of *Tukárám v. Rámchandra* (*supra*) having arisen in this case, we are not prepared to follow that precedent. We consider that the question should be re-considered with reference to *Gangubái v. Rámanná* (c), *Sadabart Prasad Sahu v. Foolbash Koer* (d), *Appovier v. Rama Subba Aiyar* (e).

(a) 6 Bom. H. C. Rep. A. C. J. 1. (b) Ibid. 247.

(c) 3 Bom. H. C. Rep. A. C. J. 66. (d) 3 Beng. L. R., F. B., 31.

(e) 11 Moo. Ind. App. 75.

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The special appeal was heard by WESTROPP, C.J., MELVILL, WEST, and NANABHAI, JJ., on the 24th June 1873.

Shántárám Náráyan (with him Ghanashám Nilkant) for the appellant referred to *Vasudev Bhat v. Venkatesh Sánbhav*

Fakirápá Lingápá, contra cited Ballojee v. Venkapa (f) Bajee v. Pandoorung (g).

WESTROPP, C.J.:—This Court is of opinion that the case of *Tukárám v. Rámchandra (supra)* was rightly decided. The question as to the right of a coparcener to alienate, for valuable consideration, his share in Hindu family property before partition, has been lately so fully considered in *Vasudev Bhat v. Venkatesh Sanbhav*, that we deem it unnecessary to discuss in detail the authorities upon that question. We adopt the view there taken by the Division Court, in which *Tukárám v. Rámchandra* was then cited and approved. The only case in point cited for the respondent and not there mentioned is *Bajee v. Pandoorung (supra)*, in which the Sudr Adalut held that one of two brothers, undivided in estate, could not sell his share in Hindu family estate, without the consent of the other. The Munsif, however, had ruled the contrary. The Assistant Judge, upon the opinion of the Shástri of the Zillah Court, reversed the Munsif's decree. Mr. Simson, the sitting Judge in the Sudr Adalut, after consulting the Shástri of that Court, admitted a special appeal against the decree of the Assistant Judge, being of opinion "that there was reason to suppose that the facts of the case had not been explicitly laid before the Shástri of the Zilla Court." Mr. Bell, the single Judge, however, when the case was called on for hearing, decided that there was no room for such a supposition, and under this view dismissed the appeal with costs. On examination of the opinion of the Zilla Shástri, it will be seen that there is an inconsistency in it.

* *Supra*, page 282.

(f) Sel. Rep. S. D. A. 216.

(g) Morris, Part II. p. 93.

He says, "neither brother can sell his share before separation; " and yet he adds, "the part of the house containing the cookroom and place of worship belongs to the elder brother and the other half of the house to the younger"—a dictum at variance with the doctrine in *Appovier v. Rama Subba (supra)*. Moreover, there does not appear to have been any reference to decided cases in *Bajee v. Pandoorung*. For these reasons, it does not appear to this Court to be an authority of any weight.

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BIN
CHANMAL'PA'

The case of *Tukárám v. Rámchandra* was followed by MELVILL and KEMBALL, JJ., in Special Appeals 33 and 34 of 1871, decided 14th June 1871, and in Special Appeal 503 of 1870 decided by the same Judges on the 6th November 1871, and in several other cases.

In replying to the question here referred to us by GIBBS and KEMBALL, JJ., that we consider *Tukárám v. Rámchandra* to have been rightly decided, and to be in accordance with the settled law of this Presidency, we must not be understood as indicating the extent to which that case is applicable under such circumstances as those of the present special appeal.

We remand this cause for final decision to the first Division Court.

The Division Court held the plaintiff, on behalf of himself and four of his coparceners, entitled to recover five-sixths of the house, and the defendant, as alienee of Basling-ápá, entitled to the remaining sixth part.

[APPELLATE CRIMINAL JURISDICTION.]

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REG. v. BA'I RATAN.

*Code of Criminal Procedure (Act X. of 1872) Secs. 122 and 346.
Unsigned confession inadmissible—Oral evidence to prove unsigned
confession.*

The confession of an accused person, taken by a Magistrate having no jurisdiction to commit or try him, is imperfect, if not signed by the accused person or attested by his mark, and is inadmissible in evidence (Secs. 122 and 346, Criminal Procedure Code.)

The term "Preliminary Inquiry" in the final clause of Sec. 346 means such inquiries as are the subject of Chapters XIV. (of Inquiries and Trials) and XV. (of Inquiry into cases triable by the Court of Session or the High Court); and, therefore, that clause does not apply to confessions recorded under Sec. 122, which refers to an inquiry not during a trial or one held with a view to committal, but an inquiry for the purpose of forwarding confessions, when recorded, to the Magistrate by whom the case of the accused person is inquired into or tried. Consequently, when a confession taken under Sec. 122 is inadmissible in evidence, oral evidence to prove that such a confession was made or what the terms of that confession were, is inadmissible also (Sec. 91 of the Indian Evidence Act).

THE accused, Bái Ratan, was tried along with her paramour, Dádábhái, for the offence of murder by H. M. Birdwood, Session Judge of Surat. Dádábhái was acquitted, but Bái Ratan was convicted and sentenced to death.

The proceedings having been submitted by the Session Judge for confirmation of sentence and an appeal having also been admitted, the case was heard by MELVILL and NANABHAI HARIDAS, JJ.

It appeared during the hearing that the conviction of Bái Ratan was based solely on her own confession, taken by a to Second Class Subordinate Magistrate not empowered either to try or commit the accused for trial, which confession was neither signed by her nor attested by her mark.

The Division Bench, entertaining doubts as to the admissibility in evidence of this confession, referred four questions for the decision of the Full Bench, with the following remarks :—

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The appellant, Bái Ratan, has been convicted of the murder of her husband, Jai Nathu, and sentenced to death.

She was tried together with her paramour, Dádábhái, and the Assessors found both the prisoners guilty, but the Session Judge acquitted Dádábhái on the ground of the insufficiency of the evidence. Against this judgment of acquittal, the Government has not appealed.

It is proved that Jai Nathu died from the effect of arsenic administered to him in his dinner.

Bái Ratan, while in custody of the Police, made a statement in the presence of a Magistrate (not the committing Magistrate) which was reduced into writing.

At the trial, Dádábhái's pleader objected to the admission of the document because it had not been signed by Bái Ratan. The Session Judge overruled the objection on the ground that the Magistrate, by whom the confession had been recorded, deposed that it had been duly made.

A child of Bái Ratan and the deceased has given confirmatory evidence as to most of the circumstances mentioned in the confession. There is nothing in his deposition which carries the case against Bái Ratan further, except a statement that on the night in question, she, contrary to her usual custom, cooked her husband's dinner separately from that of the rest of the family. This statement was disbelieved by the Session Judge, but we see no sufficient reason for rejecting it. There is no other evidence against Bái Ratan.

The Session Judge's reasons for convicting Bái Ratan are set forth in the following extract from his judgment :—

“ Bái Ratan admits that a criminal intimacy had existed between her and Dádábhái, and that she left her own house,

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at the summons of Dádábhái, and went to meet him in a neighbouring village. She admits that she saw Dádábhái mixing poison in her husband's dinner, and that she remained silent. She knew, according to her own admissions, that it was Dádábhái's intention to take her husband's life; for she says, in her statement, that Dádábhái had promised to give the Bhil from whom he had obtained the poison, Rs. 50, on the dead body of her husband coming out of her house. When she called in a neighbour early in the morning of the 30th April, she did not tell him what had happened, and it was not till after sunrise on that day that she says that she tried to administer an antidote, and then her husband's case was hopeless.

"Her excuse for her silence is that she was afraid of Dádábhái. But, as Jai Nathu's wife, she was bound to speak when she saw him eating poison which she knew would kill him.

"By her silence, then, and by her failure to use any prompt remedies after Dádábhái had left the house, she caused Jai Nathu's death. She was guilty of an 'illegal omission,' and as, under Sec. 32 of the Indian Penal Code, words, which refer to acts done, extend also to omissions, the word 'act' as used in Section 299 of that Code, would apply to Báí Ratan's conduct, as it was described by herself on the 6th May last.

"She did not admit any such intention as is contemplated in the first three clauses of Section 300, but under the circumstances, as admitted by herself, she must have known that her illegal commission was 'so imminently dangerous that it must in all probability cause death' (Clause 4 of Section 300), and she was guilty of the omission, 'without any excuse for incurring the risk causing death'; for fear of Dádábhái was not, under the circumstances, any excuse—(see Section 94 of the Indian Penal Code).

"Báí Ratan can, I am of opinion, be properly convicted, on her own past admissions, of the offence of murder."

The points of law, on which we desire to have the advantage of a decision by the Full Bench, are the following :—

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1. Whether the statement or confession is admissible in evidence, the same not having been signed by Bái Ratan ?

2. If that document be not admissible, whether oral evidence is admissible to prove that a confession was made by Bái Ratan, and the terms of such confession ?

3. Whether the statement or confession amounts to a confession of murder, or of any other offence ?

4. Whether, regard being had to the circumstance that Dádábháí has been acquitted, Bái Ratan can be legally convicted, on the evidence above stated, of murder or of any other offence ?

The reference was heard by WESTROPP, C.J., and MELVILL, WEST, PINHEY, and NANABHAI HARIDAS, JJ.

Ghanashám Nilkanth, as *amicus curiae*, for the accused, commented upon, with reference to the first question, Sections 122, 345, and 346 of the Criminal Procedure Code, (Act X. of 1872). Observing that Section 346 of the new Procedure Code corresponds to Section 205 of the late Procedure Code, he cited *Reg. v. Timmi (a)*, *Reg. v. Mussanút Niruni (b)*, and *Reg. v. Bhikaree (c)*.

With respect to the second question : whether, the confession being inadmissible, oral evidence was admissible to prove that it was made by Bái Ratan and the terms of that confession, he relied on Section 91 of the Indian Evidence Act, and mentioned 3 Russell on Crimes and Misdemeanors 449, Taylor on Evidence § 36, *R. v. Hollingshead (d)*; *Phillips v. Wimburn (e)*, *Shekú Ibrahim v. Parvátá (f)*, and commented on Sections 4, 21 (7), 115, 122, and 346 of the Criminal

(a) 2 Bom. H. C. Rep. 125. (b) 7 Calc. W. Rep. Cr. R. 49.

(c) 15 Calc. W. Rep. Cr. R. 63. (d) 4 C. and P. 242.

(e) Ibid. 273. (f) 8 Bom. H. C. Rep. A C. J. 163.

1873. Procedure Code of 1872, and Section 65 of the Indian
 REG. Evidence Act, and submitted that both the first and second
 २. questions should be answered in the negative.
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It is unnecessary to notice the arguments on the other questions.

Dhirajlál Mathurádás (Government Pleader):—With respect to the 1st question, Section 346 of the Criminal Procedure Code contemplates two modes of recording the examination of the accused. The first is when the examination is taken in the handwriting of the Magistrate, and the second is when it is not so taken. The word "record" in the clause "the accused person shall sign or attest, by his mark, such record," refers to the next preceding clause, which contemplates the second of the two modes above stated. The signature or mark of the accused is required only in the case when the Magistrate does not record the statement in his own writing. It is only in such case the provision under consideration is to be enforced and not otherwise.

But supposing the confession to be inadmissible, yet oral evidence can be received in proof of it under the last proviso of Section 346, because the confession was taken by the Magistrate at a preliminary inquiry. The word "investigations" applies to police action, and the word "inquiry" to the action of a Magistrate or Sessions Court. When the Police brought the accused to the Magistrate who recorded the confession of the prisoner, the process of investigation ceased and that of inquiry commenced. Section 122 provides that when the magistrate, *upon inquiry*, has reason to believe that the confession was made voluntarily, then only he shall record the confession. This shows that the action of the Magistrate is to be in connection with the inquiry. But supposing the action of the Magistrate, who recorded the confession, fell under the term "Police investigation," yet as there is no separate definition of the term "preliminary inquiry," and as the term "inquiry" defined

in Section 4 is large enough to include any proceeding conducted by a Magistrate, it may be concluded that the Legislature intended that the recording of a confession by any Magistrate was in connection with an inquiry preliminary to the trial. Oral evidence is, therefore, admissible under Section 346. By Section 80 of the new Evidence Act, the Court is bound to presume that the confession was duly made.

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[WESTROPP, C.J.:—But, on the face of it, the confession was not duly taken, because it does not bear the signature or mark of the accused as required by law.]

According to English law, oral evidence may be received—see Taylor on Evidence, Section 817; 3 Russell on Cr. 455 and 456. In *Lambe's case* (g) the signatures both of the Magistrate and the prisoner were omitted. The Magistrate's signature was necessary under the statutory provision of law. And yet the Magistrate's clerk was called to give evidence as to what the prisoner had said independently of the prisoner's confession as contained in the record.

[MELVILL, J.:—But the English statute does not contain the prohibition in Section 91 of our Evidence Act.]

Where a document is inadmissible for want of stamp or registration, it may be used for the purpose of refreshing one's memory—see 2 Taylor on Evidence, Section 1268, and Section 159 of the Evidence Act. This case may be remanded in order that evidence may be taken in proof of the confession of the accused.

Ghanashám Nilkanth in reply:—The contention, that the accused's signature or mark is required only when the statement of the accused is not taken down in the handwriting of the Magistrate, is both fallacious and opposed to the drift and natural construction of Section 346. The making of a memorandum does not give the examination of the accused the character of a record. If clause 1 be put together with

1873. clause 3 of Section 346, it will be seen that the examination must be called a record, whether it is taken down in the handwriting of the Magistrate or not. The limit, therefore, sought to be put on the provision which requires the signature or mark of the accused, is groundless. The record must be signed or attested by the mark of the accused in either case. In the present case, it not having been so signed or attested, has been illegally admitted in evidence.

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With respect to the 2nd question, it has been contended that the confession of Bái Ratan was taken at a preliminary inquiry. The expression in Section 122, that when the Magistrate, *on inquiry*, shall be satisfied that the confession was freely made, then only he shall record it, has been relied on by the Government Pleader to settle the meaning of the action of the Magistrate who recorded the confession in this case. That inquiry only means an inquiry into the voluntariness of the confession. The first portion of the section shows in antithesis that the Magistrate, who records the confession, shall forward the same to the Magistrate *by whom the case is inquired into or tried*. The Magistrate, in the present case, has recorded the confession not upon an inquiry into the case. Besides, the authorities already cited show that a preliminary inquiry means an inquiry before the committal or trial of a case, and that it must be held by a Magistrate having jurisdiction to commit for trial—Sections 357, 358, 471 of the Procedure Code. The confession of Bái Ratan was, therefore, not recorded at a preliminary inquiry, and, hence, the last proviso of Section 346 does not assist the prosecution in the present case. There is another reason why that proviso is not applicable. The proviso refers to a defect in recording the examination of the accused, while the statement of Bái Ratan was not an examination taken before a Magistrate having jurisdiction under Section 193 of the Criminal Procedure Code. The distinction of examination before a Magistrate having jurisdiction, and a confession to a Magistrate having no

jurisdiction, is drawn by Section 45 of the Code. Section 91 of the Indian Evidence Act completely bars the admission of oral evidence to prove the confession which is forthcoming. If the secondary evidence were admissible either under the Procedure Code or the Evidence Act, then the confession might have been permitted to be used to refresh the memory of the Magistrate under Section 159 of the Evidence Act. But as the case stands at present, the confession cannot be used at all.

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The judgment of the Full Bench was delivered on the 18th September 1873 by—

WESTROPP, C.J. :—Four questions have been submitted to the present Full Bench by the Division Court.

Of these the first is : “Whether the statement or confession of the accused Báí Ratan is admissible in evidence, the same not having been signed by her ?”

This question depends upon the construction of Sections 122 and 346 of the Criminal Procedure Code, and upon the extent to which the latter section is applicable to the confession made under the former section.

Those sections are the substitutes for the latter part of Section 149 and for Section 205 of the late Criminal Procedure Code, neither of which contained any provision as to the accused signing the confession made by him or his examination.

With Section 205 of that Code, the Courts required a strict compliance : *Reg. v. Mussamut Niruní* (*h*), *Reg. v. Bhikaree* (*i*), *Reg. v. Timmi* (*j*), *Reg. v. Kallá* (*k*), *Reg. v. Pevádi* (*l*), *Reg. v. Vithojí* (*m*), *Reg. v. Ganú* (*n*). In some of the last-mentioned instances, the Court remanded the cases in order that the evidence of the writer of the alleged confession or

(*h*) 7 Calc. W. Rep. Cr. R. 49. (*i*) 15 Ibid. 63.
 (*j*) 2 Bom. H. C. Rep. 125 2nd. ed. (*k*) Ibid. 395.
 (*l*) Ibid. 397. (*m*) Ibid. 398. (*n*) Ibid. 399.

1873. of some other person present might be taken to prove that
 REG. it had been made, the record of it being inadmissible on
 v. account of its want of accordance with the requirements
 BA'I of Section 205.
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In *Reg. v. Váhálá Jethá (o)*, it was held that the words "a Magistrate" in Section 149 of the same Code mean "any Magistrate," and, therefore, that although the practice of taking prisoners before a Magistrate, not having jurisdiction to try or commit for trial, for the purpose of having a confession recorded, was not generally desirable, yet such a confession was legally admissible.

The new Code, adopting that decision, has, in its 22nd and 122nd sections, expressly authorized any Magistrate to record a confession of the accused. The final clause in Section 45 renders such confessions, as that section relates to, admissible in evidence in all subsequent proceedings.

The confession of Bái Ratan has been recorded by a Second Class Magistrate, who has not original jurisdiction either to commit or try such a case as the present, and who was not deputed under Section 115, by a Magistrate having jurisdiction, to hold a preliminary inquiry or otherwise to dispose of it. Accordingly, the Second Class Magistrate only recorded the confession, the matter having been brought before him previously to the inquiry held by the committing Magistrate.

Section 122 of the new Criminal Procedure Code especially treats of such confessions. It is to be noted that it is part of the Chapter (X.) relating to "investigation" by the Police, which is carefully distinguished in the glossary of the Code (Section 4) from "inquiry" by a Magistrate or Court; and that Sections 21 (cl. 7) and 22cl. 2.) describe such confessions as confessions "during a Police investigation."

Section 122 enacts that "Any Magistrate may record any statement made to him by any person, or *any confession made*

(o) 7 Bom. H. C. Rep. Cr. Ca. 56.

to him by any person accused of an offence by any Police Officer or other person. Such statements shall be recorded in the manner hereinafter prescribed for recording evidence, and such confession shall be taken in the manner provided in Sections 345 and 346, and shall, when recorded, be forwarded to the Magistrate by whom the case is inquired into or tried." Pausing here, it is, with especial reference to the concluding passage in Sec. 346, important to remark : 1st—that Sec. 122 only provides that the confession " shall be taken," (and not that it shall also be otherwise dealt with, or its defects, if any, supplied,) " in the manner provided in Sections 345 and 346;" 2ndly—that the taking of such a confession is clearly distinguished in Sec. 122 from the inquiry into the case, because that section provides that when the confession is recorded, it shall " be forwarded to the Magistrate by whom the case is inquired into or tried." The same section then proceeds thus : " No Magistrate shall record any such confession unless, upon inquiry, he has reason to believe that it was made voluntarily, and he shall make a memorandum at the foot of any such confession to the following effect : ' I believe that this confession was voluntarily made.'

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(Signed) A. B.
 Magistrate."

The inquiry, spoke of in this latter portion of Sec. 122, is not an inquiry into the case, but simply into the question whether the confession is voluntarily made.

Section 346, taken *per se*, would appear to apply only to examinations of the accused taken on inquiries (as distinguished from investigations) and trials. We find it in the sub-division of Chapter XXV. relating to " The examination of accused persons " which seems to be quite a distinct process from a statement or confession made during the Police investigation. Were this not intended to be so, Sec. 122 would have been superfluous.

1873. Section 346 consists of five portions, which, for convenience of reference, we have marked with the letters (a), (b), (c), (d) and (e), and enacts that :

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(a)—“Whenever an accused person is examined, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, and shall be shown or read to him, and he shall be at liberty to explain or add to his answers.

(b)—“When the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate or Sessions Judge, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.

(c)—“In cases in which the examination of the accused person is not recorded by the Magistrate or Sessions Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the vernacular of the District, or in English, if he is sufficiently acquainted with that language; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall be annexed to *the record*. If the Magistrate or Sessions Judge is precluded from making a memorandum as above required, he shall record the reason of his inability to do so.

(d)—“The accused person shall sign or attest by his mark such record.

(e)—“If the examination be taken in the course of a preliminary inquiry, and the Court of Session find that the provisions of this section have not been fully complied with, it shall take evidence that the prisoner duly made the statement recorded: Provided that, if the error does not prejudice the prisoner, it shall not be deemed to affect the admissibility of the statement so recorded.”

For the Crown it has been argued that this 346th section contemplates two cases: 1st—where the examination is taken down in the handwriting of the Magistrate or Sessions Judge himself, and is signed by him; 2nd—where it is taken down in the handwriting of another person in the presence of the Magistrate or Sessions Judge, but is signed by the Magistrate or Sessions Judge; in which second case he is required (if able) to make the memorandum mentioned in clause (c); and that the signature or mark of the accused, mentioned in clause (d), is required only in the second case, inasmuch as the confession, not being written by the Magistrate or Sessions Judge himself, stands in greater need of confirmation of its accuracy by the signature or mark of the accused, than in the first case, when it is written by the Magistrate or Sessions Judge personally.

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We do not concur in that argument.

Were we to refer the phrase "such record" in clause (e) to its immediate antecedent, the record, which the accused person would be required to sign, would be that of the inability of the Magistrate or Sessions Judge to make the memorandum enjoined in clause (d). To attribute such an intention to the Legislature would be absurd. Moreover in Secs. 333, 334, and 335, where a similar memorandum is required, no special safeguard is provided. Whether the examination is written down by the Magistrate or Sessions Judge himself, or by some other person for him, and in his presence and hearing, the record of it must be shown or read to the accused person, who has in either case an equal opportunity of explaining or adding to his answers; so that we see no greater reason for requiring his signature to it in one case than in the other. The reason for requiring that signature was probably the same in both cases, namely, to furnish a new and strong test whether the confession was voluntary and free from controlling influences, and to afford him a *locus penitentie*—an ultimate opportunity, before the final completion of the record,

1873. of indicating that the confession was not voluntary, or was
 REG. made under improper influence, if such were the case, and
 v. also an additional opportunity of denying the accuracy of the
 BA'I record of that confession.
 RATAN.

We think, too, that if the Legislature intended that the signature of the accused should be required to the record in the event only of its having been written by some person other than the Magistrate or Sessions Judge, it would, as it easily might, have expressly said so.

It follows from this that, in our opinion, the confession in the present case was defective for want of the signature of the accused. The error of the Second Class Magistrate, in omitting to ask her to sign, was, having regard to the probable intention of the Legislature in requiring the signature of the accused, of such a nature as may have seriously prejudiced her, and, therefore, as we think, rendered the thus imperfect record of the confession inadmissible in evidence against her. See *Reg. v. Mussamut Niruni* and *Reg. v. Bhikaree (supra)*.

It remains, then, to be decided whether this error can now be rectified; and, in considering that question, we should consider also the 2nd point submitted to us by the Division Court, viz: "If the document be not admissible, whether oral evidence is admissible to prove that a confession was made by Bái Ratan, and the terms of that confession?"

The 91st section of the Indian Evidence Act (I. of 1872) enacts that: "When the terms of a contract, or grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

Then follow some exceptions and explanations not bearing upon the present case.

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With a full recollection of Sec. 65, cl. (e) and of Sec. 74 of the same Act, we must say that this does not appear to us to be a case in which secondary evidence of the contents of the original confession would be of any avail. The primary evidence is itself forthcoming, and has been produced, and secondary evidence of its contents, whether such secondary evidence is a copy or oral evidence of its contents, would, if full and accurate, disclose the defect in the original record, namely, the absence of the signature of the accused, and the case would, accordingly, remain precisely in the same condition as it now is.

The provision in Sec. 91 of the Evidence Act that "in all cases in which any matter is required by law to be reduced to the form of a document," no evidence shall be given in proof of such matter except the document itself, must, accordingly, be regarded as an objection fatal to the adoption of the course, very justly sanctioned, before the passing of the Evidence Act of 1872, in the cases in Vol. II. Bombay High Court Reports, pp. 395 to 399, already mentioned (*i.e.*, remanding the case in order that oral evidence of the writer, or some other person or persons, present when the confession was made, may be taken as to what the accused then said, and as to the circumstances under which he said it), unless the final clause in Sec. 346 of the Criminal Procedure Code is applicable to confessions taken under Sec. 122 of that Code. If it be so, it would, as well because it is a special, as because it is a later enactment, override Sec. 91 of the Evidence Act, and evidence might be taken by the Session Court that the prisoner (accused) "duly made" a confession to the same effect as that recorded. By "duly made" is probably meant made in such a manner as not to be rendered inadmissible by Secs. 24, 25, or 26 of the Evidence Act, or Secs. 119, 120, and 121 of the new Criminal Procedure Code. [The same remark would apply to those

1873. words in the ultimate clause in Sec. 45 in that Code.] It has already been remarked that there is nothing in Sec. 122 of that Code which *per se* would have the effect of rendering the final clause of Sec. 346 applicable to confessions recorded under Sec. 122. The lastmentioned section simply prescribes that confessions shall be "taken" in the manner prescribed in Secs. 345 and 346, but is silent as to the mode, if any, in which irregularities may be cured. The question, then, is whether the language in the final clause of Sec. 346 is, of itself, sufficient to include confessions under Sec. 122. We are of opinion that it is not. The examination spoken of in the final clause of Sec. 346 is an "examination taken in the course of a preliminary inquiry." It should be noted that the term used is not "inquiry" simply. Were it so, the description of that term given in the Glossary (Sec. 4) might be resorted to, though we are not now prepared to say positively that we could regard the recording by a Magistrate (without power to commit for trial or to try) of a confession under Sec. 122 as an inquiry within Sec. 4. By the term "preliminary inquiry," which is the phrase employed in the final clause of Sec. 346, we understand such inquiries as are the subject of Chapters XIV. and XV. of the new Code. The phrase "preliminary inquiry" actually occurs in Secs. 115, 346, 357 and 471, and in the margin to Sec. 189 only; but the context shows that, in the majority of cases in which "inquiry" is mentioned, it means inquiry by the committing Magistrate. The examination of the accused, taken in the course of preliminary inquiry mentioned in Sec. 346, is the examination taken during such inquiry by the Magistrate under Sec. 193, and rendered admissible in evidence by Sec. 248. The distinction between examination and confession is plainly drawn in the two last clauses of Sec. 45.

It is worthy of notice that the power to take evidence, *aliunde*, of the examination of the accused, when the record of it is irregular, is, by Sec. 346, intrusted to the Court of Session only. So that in the case of such a record, as that in

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the present case, of the confession of the accused being forwarded to a Magistrate having jurisdiction to commit or try, he could not remedy the irregularity by taking evidence, <i>aliunde</i> , of the confession.	1873. <hr/> REG. v. BA'I RATAN.
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For these reasons, we think that the first and second questions, submitted to us by the Division Court, must be answered in the negative.

It having been admitted by the Government Pleader that, without the confession, there is not sufficient evidence to sustain the conviction, and that too being, as we are informed, the opinion of the Division Court, Sec. 167 of the Evidence Act is not applicable here, and, for the same reason, it being impossible to maintain that the accused has not been prejudiced in her defence by the improper admission of the confession at the trial, Sec. 283 of the new Criminal Procedure Code is also inapplicable. Hence our answers to the first and second questions must be fatal to the conviction, and it becomes unnecessary for us to answer the third and fourth questions.

This case has been well argued on both sides, and we are especially indebted to Mr. Ghanashám Nilkant, who has generously volunteered his valuable services on behalf of the accused. She would otherwise have been *inops consilii*.

The case is remitted for final disposal to the Division Court.

25th September 1873. On this day the Division Bench (MELVILL and NANABHAI HARIDASS, JJ.) directed the accused Bái Ratan to be acquitted and discharged.

Accused acquitted.

NOTE BY THE EDITOR :—The above Full Bench ruling was followed in *Reg. v. Apa bin Kesu* decided by MELVILL and PINHEY, JJ., on the 25th September 1873.

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[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 4 of 1873.

✓ GIRDHARLA'L DAYA'LDA'S (Pltf.) Appellant.

JAGANNA'TH GIRDHARBHA'I and CHOTA'LA'L

ULA'SRA'M (Defts.) Respondents.

Judge's referring to documents, and facts not in the plaint—Malicious prosecution without reasonable or probable cause—Amount of damages.

A Judge, in considering, under Sec. 32 of the Civ. Pro. Code, whether he should admit or reject a plaint, is wrong in referring to documents and facts not stated in, or annexed to, the plaint, nor ascertained by him by interrogation of the plaintiff, although such documents and facts may have been on record in other proceedings in the Judge's Court.

In a plaint, claiming damage for an unsuccessful criminal prosecution of the plaintiff by the first defendant, and sanctioned by the second defendant as a Subordinate Judge, the plaintiff (though, stating in the plaint that the second defendant "maliciously and without authority" sanctioned the prosecution, and that the Magistrate, before whom it was brought, held that there was no cause whatever for the charge,) did not allege in the plaint that the 1st defendant prosecuted him (plaintiff) maliciously and without any reasonable or probable cause, or that the prosecution was sanctioned by the 2nd defendant without reasonable or probable cause ;

Held that the plaint was properly rejected, and that there was no good ground for allowing the plaint to be amended, the plaintiff having delayed the filing of it until the last day but one allowed by the law of limitation.

Quære—Whether the first and second defendants could properly be joined in such an action ?

In every such plaint, plaintiff should name the amount of damages which he seeks to recover as compensation for the injury of which he complains.

THIS was a regular appeal against a decision of Mr. Newnham, the District Judge at Surat.

Girdharlál Dayáldás instituted this suit against Jagannáth Girdharbhái for damages or compensation for a criminal prosecution unsuccessfully brought against him (Girdharlál) by Jagannáth, and against Chotálál Ulásráam, the 2nd defendant, as the Subordinate Judge at Broach, for sanctioning that prosecution "maliciously and without authority." The District Judge rejected the plaint on the facts and for the

reasons contained in the following extract from his judgment:—

“ On consulting several papers on my records, which bear on the facts leading to this prosecution, I find that about the year 1869 Jagannáth obtained a decree in the Broach Court against Girdharlál and his brother, which was confirmed, on appeal, by my predecessor, Mr. Kemball, who, at the same time, remarked on the frivolous character of the principal objections taken by the defendants. Sometime afterwards, Girdharlál instituted criminal proceedings against Jagannáth, believing that he had discovered new evidence and requested the Broach Subordinate Judge's sanction to them. Being refused, he applied to me; but I declined to give such sanction as long as Mr. Kemball's decree remained unaltered. On this, he applied for a review of judgment which was allowed; but, after enquiry, I found no sufficient reason to disturb my learned predecessor's decree.

“ On this, it appears that Girdharlál prosecuted on a charge *not requiring sanction*, as I find Jagannáth tried by the Acting Assistant Session Judge of Broach for criminal breach of trust, but at once acquitted, that officer holding that the allegations of the prosecutor himself did not warrant such a charge.

“ Jagannáth, then, in his turn, sued on another note. Girdharlál and his brother put in an answer for which Jagannáth prosecuted the former, the Subordinate Judge giving formal sanction. The Magistrate, Mr. Entee, however, discharged him, expressing strongly his opinion of his innocence. Hence this plaint which has been tendered on the last day allowed by the law of limitation.

“ Against Jagannáth, there is certainly a ground of action; but with regard to the Subordinate Judge—the inclusion of whom in the plaint has rendered necessary its presentation in this Court—this is the first plaint of the kind that I have seen.

“ In the cases of *Vináyak v. Itchá* (a) and *Venkat v. Armstrong* (b) there was an irregularity in defendant's actions; in

(a) 3 Bom. H. C. Rep. A. C. J. 38.

(b) Ibid. 47.

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1873. the latter case, WESTROPP, J. remarked ‘*prima facie* the act complained of is a wrongful act.’ So in *Vithobí v. Corfield* (c), the action was irregular. But in this case, the Subordinate Judge had clearly jurisdiction to give leave for a prosecution, if he thought it advisable, although the plaintiff says it was done ‘without authority’ (*vagar ádhikári*) whatever he may mean by that. There is no question of the Subordinate Judge ‘believing himself in good faith to have jurisdiction’ (Act XVIII of 1850); he *had* jurisdiction, acting on his opinion of the case. The plaintiff, it is true, charges him with acting ‘in malice’ (*ráp budhi thi*). But if every one, who may choose to assert that a public officer performed a perfectly regular act *maliciously*, is to be allowed to sue him in the Civil Court, it follows that every Magistrate and every Sessions Judge, whose sentence may be reversed on appeal, must be prepared to vindicate the good faith of his decision, as defendant in a suit brought by the successful appellant. Either Act XVIII. of 1850 was passed to prevent a state of things so absurd and so contrary to public policy as this, or it is all but useless.

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“I find that the plaintiff has no cause of action against the Subordinate Judge; he might sue Jagannáth, but it must be in the Lower Court. Had he done his, this Court would have, on his application, transferred the suit to the Court of another Subordinate Judge. As a matter of course the plaint is rejected.

“I observe, moreover, that the claim is not valued, and made on a 10 Rupee stamp; this is also incorrect, as nothing hindered the plaintiff from appraising the injury he has sustained at whatever rate he pleased.”

The appeal was heard before WESTROPP, C.J., and MELVILL, J., on the 25th April 1873.

Nagindás Tulsidás (with him *Chunilál Mániklál*) for the appellant.

WESTROPP, C.J.:—This is an appeal from the decision of the District Judge which rejected, under Sec. 32 of the Civil

Procedure Code, a plaint presented by a Vakil of the High Court against the defendant, Jagannáth Girdharbhái, for a malicious prosecution for giving false evidence, and against the defendant, Chotálál Ulásráam, Subordinate Judge at Broach, for maliciously sanctioning that prosecution.

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GIRDHAR-
BHAI AND
CHOTALAL

The District Judge was in error in referring to documents and facts, neither mentioned in or annexed to the plaint, nor ascertained by interrogation of the plaintiff by the Judge. Although those documents and facts may have been on record in other proceedings in the Judge's Court, yet being *dehors* the plaint and not stated or referred to by the plaintiff (after being questioned by the Judge as contemplated by Section 32), the Judge ought not to have taken them into consideration in order to determine merely whether or not the plaintiff made out such a *prima facie* cause of action as rendered his plaint admissible on the file.

Independently, however, of any information obtained by the District Judge of matters extraneous to the plaint, we think that it is a plaint in its present form unsustainable against either of the defendants. The plaint does state that the Subordinate Judge (the 2nd defendant) "maliciously and without authority" sanctioned the prosecution of the plaintiff, and that Mr. Mánickji Kávasji Entee, the F. P. Magistrate at Broach, was of opinion that there was no cause whatever for the charge against the plaintiff; but the plaintiff does not himself, anywhere in the plaint, aver that the charge was made against him by the 1st defendant, Jagannáth Girdharbhái, maliciously and without reasonable or probable cause, or that the sanction for the prosecution was given by the 2nd defendant, Chotálál Ulásráam, without reasonable or probable cause, which the plaintiff should have averred, inasmuch as it is quite possible that a sanction might be granted with reasonable and probable cause, and yet be so granted maliciously. No doubt, it would be very improper for, and discreditable to, any Judge or Magistrate to permit private malice or vindictiveness in anywise to enter into his motives for

1873. granting or withholding a sanction ; but if there be reasonable and probable cause for the sanction, it would not be vitiated in legality by the improperly superadded malice.

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GIRDHAR
BHA'I AND
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So too as regards the prosecutor ; he may be strongly actuated by malice in bringing a prosecution, but, if he have reasonable and probable cause for it, his malice does not render him liable to action for having prosecuted.

In *Johnstone v. Sutton* (d), it is appositely said in the judgment of the court : "The essential ground of this action is that a legal prosecution was carried on *without a probable cause*. We say this is emphatically the essential ground ; because every other allegation may be implied from this ; but this must be substantively and expressly proved, and cannot be implied.

"From the want of probable cause, malice may be, and most commonly is implied. The knowledge of the defendant is also implied.

"From the most express malice, the want of probable cause cannot be implied.

"A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt ; and in neither case is he liable to this kind of action."

And in *Morgan v. Hughes* (e), Buller, J., said :—"The grounds of a malicious prosecution are, 1st, that it was done maliciously, and 2ndly, without probable cause. The want of probable cause is the gist of the action."

In an anonymous case reported in 6 Mod. R. 73, the court of K. B. held "that let a prosecution be never so maliciously carried on, yet if there be *probable cause* or ground for it, no action for malicious prosecution will lie." See also *Reynolds v. Kennedy* (f), 2 Saunders Pl. and Ev. by Lush 321, 324 2nd ed.

(d) 1 T. R. 544 (e) 2 *Ibid.* 231. (f) 1. *Wils.* 232.

We think, therefore, that for these reasons, and not for the reasons relied upon by the District Judge, he was justified in rejecting the plaint, and we affirm his order.

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v.

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GIRDHAR-
BHAI AND
CHOTA'LAL.

As regards the stamp, we are of opinion that it, being one for 10 rupees, would have covered damages to the extent of Rupees 130 and no more, and that there was no reason why the plaintiff should not have named the amount of damages which he sought to recover as compensation for the injury of which he complained.

We see no grounds sufficient to induce us to permit the plaintiff to amend his plaint, he having delayed the presentation of it until the last day, or last day but one, on which the law of limitation would permit him to file it.

We decide nothing as to the propriety of joining both defendants in one action, and as to the necessity of suing them, if at all, separately. It is unnecessary for us to determine that question, and by our silence on that point we are not to be understood as concurring in the course adopted by the plaintiff.

Order affirmed.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 65 of 1871.

April 9.

FA'TMA' KOM NUBI SA'HEB *Appellant.*
DARYA' SA'HEB and THE COLLECTOR of

KALADGI *Respondents.*

Proper framing of plaint—Amendment—Collector's books—Title.

A person, claiming a share in land in right of heirship, cannot sue a Collector for entry of his name in the revenue books, but sue the coheirs for an award of a share in the land, or for a declaration of right to such a share.

The Collector's book is kept for purposes of revenue not for purposes of title, and the fact of a person's name being entered in the Collector's book as occupant of land, does not, necessarily, of itself establish that person's title, or defeat the title of any other person.

1873.
 FÁ'TMÁ' KOM
 NUBI SÁ'HEB
 v.
 DARYÁ'SÁ'HEB
 AND THE
 COLLECTOR OF
 KALADGI.

FÁ'TMÁ', the appellant, brought this suit to obtain a decree directing the Collector of Kaladgi to enter her husband's lands in her name in the Revenue books. Her husband, Nubi Sáheb, died on the 31st October 1868; and after that event she applied for and obtained a certificate of heirship; which she presented to the Collector and requested him to enter in her name the *Indám* lands which formerly stood in her husband's name; the Collector, instead of doing so, entered the lands in the name of Daryá Sáheb. She, therefore, prayed for a decree for the entry of her name in the Collector's book.

Daryá Sáheb answered *inter alia* that he was the heir of the deceased Nubi Sáheb, and that the lands were entered in his name with the consent of Huzrutmá, the elder widow of Nubi Sáheb.

The Collector answered that the lands were entered in the Government books with the consent of the senior widow of Nubi Sáheb; and that the certificate obtained by the plaintiff showed that she was only one of the heirs of Nubi Sáheb.

The Senior Assistant Judge threw out the plaintiff's claim on the ground that she failed to prove herself to be the sole heir of the late Nubi Sáheb, and held that, on that ground alone, she could not claim to have the whole property entered in her name.

In special appeal, Fátmá, among others, took this objection:—A decree for ownership should have been given to the extent of the rights of the appellant, but the claim should not have been rejected.

The special appeal was argued before WESTROPP, C.J., and MELVILL, J., on the 9th April 1873.

Macpherson (with him *Fakiráppá*) for the appellant.

Mayhew, Legal Remembrancer (with him *Dhirajlál Mathurádús*, Government Pleader) for the respondents.

1873.

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WESTROPP, C.J.:— We think that the Collector has been unnecessarily made a party to this suit and that the plaintiff's professional adviser in the Court below has not properly framed her suit. The prayer for relief, which her plaint ought to have contained, should have been for an award of her share in the property of her deceased husband, or for a declaration of her right to such a share, and not for the entry of her name in the Collector's book. The fact that another person's name has been entered in the Collector's book, as occupant of the land, does not necessarily of itself establish that person's title, or defeat the title of the plaintiff. The Collector's book is kept for purposes of revenue and not for purposes of title, and, as a general rule, although there may be more persons than one entitled to land, it is the practice of collectors, as a matter of convenience, to enter in their books only the name of one person as occupant of a field or recognized share of a field. The Collector, therefore, ought not to have been made a party to this suit. The proper parties as defendants would have been the present first defendant Daryá Sáheb, the elder widow of Nubi Sáheb (Huzrutmá), and the other persons, if any, claiming to be heirs of Nubi Sáheb. In that case, the Collector not being a party, the plaint should have been presented in the Court of the Subordinate Judge of Bagalkot, as the lowest court having jurisdiction. We think that the proper course in the present case, in order, so far as possible, to save expense to the parties (an object which should never be lost sight of by Courts of justice), will be to reverse the decree of the Senior Assistant Judge and to strike out the name of the Collector as a defendant, and, as he very properly does not ask for costs against the plaintiff, without costs, and to permit the plaintiff to amend her plaint by praying to be allotted her share in the property of her deceased husband, Nubi Sáheb, and by adding, as parties to this suit, Huzrutmá, his other widow, and the other persons, if any

1873. such there be, who claim to be his heirs, and to direct that, after the making of those amendments, this cause and all the proceedings therein be transferred to the Court of the Subordinate Judge of Bagalkot for retrial on the merits. The parties respectively to be at liberty to give such further evidence as they may be advised and as may be legally admissible. Costs of suit and of this appeal to follow the result of the retrial.*

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v.
DARYA'SAHEB
AND THE
COLLECTOR OF
KALADGI.

Decree reversed and case remanded.

[APPELLATE CIVIL JURISDICTION.]

1873.
April.

Special Appeal No. 337 of 1872.

VRIJAVALABHDA'S KHUSHA' LDA'S.....*Appellant.*

THE COLLECTOR OF AHMEDABAD.....*Respondent.*

Bombay Act IV. of 1868, Sec. 4—Non-liability to pay assessment—Possession.

Where land in a Town in the Presidency of Bombay was found to have been in plaintiff's possession from 1858 to 1871 without any payment by him of Land Revenue to Government:—

Held that it was not liable to pay assessment under Bombay Act IV. of 1868.

THIS was a special appeal from the decision of F. D. MELVILL, District Judge of Surat, in Appeal No. 273 of 1871, reversing the decree of M. H. Scott, Assistant Judge in the same district.

Vrijavalabhdás brought this suit to obtain a declaration that he was entitled to hold, free of assessment, a certain piece of ground in the town of Ahmedabad belonging to him, and to recover back Rs. 178-8-0, which he had paid, under protest, in obedience to an order of the defendant, on account of assessment on the ground.

* *Vide infra* p. 192 and p. 194

The Assistant Judge found in plaintiff's favour, holding him entitled to the declaration sought by him and to receive back the amount claimed. This decree, however, was reversed on appeal.

1873.
VRIJAVAL-
AHBDA'S
KHUSHA' LDA'S
v.
THE COLLEC-
TOR OF
AHMEDABAD.

The appeal was argued before WESTROPP, C.J., and MELVILL, J.

Anstey (with him *Nagindás Tulsidás*) for the appellant:— Under Bombay Act IV. of 1868, Section 4, the plaintiff's claim ought to have been awarded at once, as that section preserves existing rights. The plaintiff has been in possession under the deed of sale for more than 12 years without ever having paid assessment on the ground in question. The *onus* lies on Government to show that assessment has been paid: *Heera v. Lokenath* (a).

Mayhew, Legal Remembrancer, (with him, *Dhirajlál Mathurádás*, Government Pleader) for the respondent.

PER CURIAM:—Inasmuch as it appears that the plaintiff has held under the deed of sale and been in possession of the land mentioned in the plaint, from the year 1858 to the time of the filing of the plaint (1st August 1871), without paying land revenue to Government, and the land, therefore, is exempted from assessment under Bombay Act IV. of 1868, Sec. 5, cl. 1, para. 2, this Court reverses the decree of the District Judge and restores that of the Assistant Judge with costs.

Decree reversed with costs.

(a) 2 Calc. W. Rep. 135 Civ. Rul.

1873.
June 9.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 74 of 1872.

THE COLLECTOR OF POONA *Appellant.*

BHAVA'NRA'V BA'LKRISHNA *Respondent.*

Action against Collector—Entry in the Revenue Books—Title.

The mere entry of the name of one parcener in immoveable property in the Collector's books, as the occupant or owner is not sufficient ground for an action by a coparcener against the Collector, inasmuch as the Collector's books are kept for purposes of revenue and not for purposes of title. But if the Collector improperly enjoin the plaintiff from taking or other parties from paying to the plaintiff his share of the rents or profits, an action may be maintained against the Collector.

THIS was an appeal from the decision of S. Tagore, Extra Assistant Judge at Tanna, in Original Suit No. 14 of 1871.

Bhavánráv instituted this suit against the Collector of Poona and Jánkibái the widow of Rámráv Krishna, and claimed a half share in the proceeds of a certain *Inám* village, whereof Jánkibái was entered in the Collector's books as *Inámdúr*. He also complained that the Collector, by an order, dated the 4th April 1867, interfered with his management of the village.

The plaint prayed for a decree for setting aside the Collector's order and requiring the Collector to pay the plaintiff, separately, his share in the profits of the *Inám* village.

The Assistant Judge held the plaintiff entitled to receive his share separately and set aside the order of the Collector. He awarded the plaintiff costs against the Collector and Jánkibái. Against this decree the Collector alone appealed to the High Court.

The appeal was argued before WESTOPP, C.J., and NANABHAI HARIDASS, J., on 9th June 1873.

Dhirajlal Mathuradas, Government Pleader, for the appellant.

Janárdan Sakhárám Gádgil for the respondent.

1873.

WESTROPP, C.J. :—If this suit complained only of the entry of the name of the second defendant, Jánkibái, in the books of the Collector, as *Inámdár*, we think that it would not lie against the first defendant, the Collector, the Collector's book being, as stated in *Fátmá v. Daryá Sáheb* (a), kept for purposes of revenue and not for purposes of title, and therefore the fact that Jánkibái's name was so entered could not have affected the title of the plaintiff. But the Collector, by his Assistant's order, dated 28th March 1871, which the Collector ratified, issued a species of injunction against the plaintiff's drawing his share of the *Inám* directly from the Kulkarni and Pátíl, and against any such payment by the latter to the plaintiff; and thereby interfered between the plaintiff and second defendant in favour of the latter, and exposed himself to the present action. If the Collector had simply referred the parties to a civil suit and said no more in his order, the plaintiff could not have maintained his suit against the Collector, and the order, whereby the Collector was charged with costs, would have been illegal, but the Collector, as already pointed out, went beyond such a reference. We must assume that the decree, so far as it affects the second defendant, is right, she not having appealed against it.

THE
COLLECTOR
OF POONA
v.
JANAVANRAO
SAXENA

NANABHAI HARIDASS, J., concurred.

*Decree affirmed with costs.**

(a) *Supra* p. 187.

* See the next case.

1873.
August 21.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 3 of 1873.

SANGA'PA' MALA'PA'*Appellant.*

BHIMANGOWDA' MARIA'PA'*Respondent.*

Jurisdiction.—Suit against Collector.—Right to object to jurisdiction.

Although the entry by a Collector of a particular person's name as 'occupant' affords, however mistaken, no ground for an action against the Collector, yet where there is an apparent and reasonable ground for apprehending legal injury from the Collector's proceedings—as when the Collector affirms one person's title to the exclusion of another by entering his name in the register of "*watans*," (compiled under Regulation XVI. of 1827, s. 19), or where damage to a person's right is likely to arise from the Collector's act—it is not improper to join the Collector as a party to a suit.

Where a suit is instituted against a Collector and another person, and the Collector does not appeal—

Held that the question of the District Court's jurisdiction to entertain the suit being a ground common to all the parties affected by the judgment, it is open to the other person to object that the plaint did not disclose a cause of action against the Collector and that the District Court consequently had not jurisdiction.

THIS was an appeal against the decision of M. B. Baker, Senior Assistant Judge, F.P., of Kaládgi, awarding the plaintiff's claim.

The facts of the case are briefly these :—

The plaintiff, Bhimangowdá, alleged that he was the hereditary *Pátíl* of the village of Zanmatti and that his family had always officiated as *watandár Pátíls*; that although the defendant, Sangápá, had nothing to do with the *Pátíl*ship, yet that the second defendant, who is the first Assistant Collector of Kaladgi, had entered Sangápá's name on the register of

watans as the sole proprietor; and prayed for a decree declaring the plaintiff to be the owner of the *watan* and entitled to officiate perpetually as *watandār*.

1873.

SANGA'PA'
MALA'PA'
v.
BHIMAN-
GOWDA'
MARIA'PA'.

The defendant, Sangápá, denied the plaintiff's right to the *watan*, as also that the plaintiff had officiated in his own right, but asserted that he had only officiated for Sangápá.

The Assistant Collector of Kaládgi stated that Sangápá was the owner of the *watan* and entitled as such to officiate perpetually.

The Assistant Judge laid down only one issue for determination, no other having been desired by the parties, viz. : "Is the plaintiff the owner of the *watan* in dispute, and is he entitled to officiate continually?" and found that issue in the affirmative. He therefore decreed for the plaintiff.

Against this decree Sangápá alone appealed.

The appeal was argued before WEST and PINHEY, JJ.

Dhirájlal Mathuradás (Government Pleader) for the defendant Sangápá:—The entry by the Assistant Collector does not affect the rights of the parties *inter se*; there is, therefore, no cause of action against him, and, consequently, no jurisdiction in the District Court: *Fátmá v. Daryá Sáheb and J. F. Armstrong, Collector of Kaládgi* (a); and *The Collector of Poona v. Bhavánráv* (b). I take this objection, which is common both to the Assistant Collector, who has not appealed, as well as to my client, the first defendant. I further submit there is no cause of action even against my client: *Bálává v. Shidgowdá* (c). On the evidence the plaintiff is not entitled to a decree.

Pándurang Balibhadra for the respondent, the original plaintiff:—The Assistant Collector not having appealed, he must be considered to have waived his right to object on the ground of jurisdiction. That ground is not common to him

(a) *Supra* p. 187.

(b) *Supra* p. 192.

(c) 7 Bom. H. C. Rep., A. C. J. 99.

1873. and the defendant, Sangápá, who has appealed, and he, therefore, cannot take it. The plaintiff does disclose a cause of action against the Assistant Collector, who has made an order that certain duties relating to the office of a *watan* holder shall be performed in perpetuity by the defendant Sangápá to the exclusion of the plaintiff. The Assistant Collector denies the plaintiff's title, asserts that of the first defendant, and sets up his own right to make the *watan* register. * A suit for such a declaratory decree, as has been asked for in this case, lies both against the first and the second defendants: *Baboo Bhugwan Singh v. Mitturjeet Singh* (d); *Meghraj Singh v. Rashdharee Singh* (e); *Brommo Moyee v. Koomodinee Kant* (f); R. A. No. 48 of 1871. The plaintiff distinctly sets forth that the plaintiff is entirely excluded from enjoyment of the *watan* by the act of the Assistant Collector. Upon the evidence the Court below came to a right conclusion.

SANGA'PA'
MALA'PA'
v.
BHIMAN-
GOWDA'
MARIA'PA'.

WEST, J. :—The first objection raised on the hearing of this appeal was that the Assistant Collector having been wrongly included as a defendant, the suit had thus improperly been thrown into a form which made it apparently cognizable only by the District Court as the Court of first instance. As against the Assistant Collector, the plaintiff, it was said, disclosed no cause of action; the plaintiff as against him, therefore, ought to have been rejected; and he being excluded as a party, the decree, it was contended, ought to be reversed and the suit remitted for trial, should any cause of action appear as against the defendant, Sangápá, to the Court of the Subordinate Judge within whose local jurisdiction it had arisen. In support of this argument, reference was made to the decisions in *Fátmá v. Daryá Sáheb and J. F. Armstrong, Collector of Kaláulgi* (*supra*) and *The Collector of Poona v. Bhavánráv* (*supra*). In the former of these cases, the suit was by the widow of a deceased *Mullá*, and she sought to have an entry in the Collector's books cancelled by which the name

(d) 17 Calc. W. Rep. Civ. R. 169.

(e) Ibid. 281.

(f) Ibid. 467.

of the second defendant had been registered as occupant of the *Inám* land attached to the *Mulláship*. The Court held that "the prayer for relief, which her plaint ought to have contained, should have been for an award of her share in the property of her deceased husband, and not for the entry of her name in the Collector's book. The fact, that another person's name has been entered in the Collector's book as occupant of the land, does not of itself necessarily establish that person's title or defeat the title of the plaintiff. The Collector's book is kept for purposes of revenue, and not for purposes of title." The Court, therefore, reversed the decree of the Assistant Judge, and, permitting the plaint to be amended by striking out the Collector's name, directed that the proceedings should be transferred to the Court of the Subordinate Judge. Again, in the more recent case, *The Collector of Poona v. Bhavánráv (supra)*, decided on the 9th June last, the Chief Justice said : "If this suit complained only of the entry of the name of the second defendant, Jánkibái, in the books of the Collector, as *Inám-dár*, we think that it would not lie against the first defendant, the Collector." It must be taken, therefore, as the settled doctrine of the Court that the entry by a Collector of a particular person's name as 'occupant' in the books, kept for the purpose of determining to whom the duty or the right attaches of settling for the Government revenue, affords, however mistaken, no ground for an action against the Collector. The reason of this, however, is that the entry does not "defeat the title of the plaintiff." Should the Collector proceed further and interfere with the plaintiff's rights by an order placing him in an appreciably worse legal position than that to which he is entitled, the Collector at once becomes liable to an action. Thus in *The Collector of Poona v. Bhavánráv (supra)* the Collector had ordered that the plaintiff should not draw his share of an *Inám* directly from the village officers. The Collector could not, by this order, really dispose of the relative rights and duties of the plaintiff and of the second defendant for, whose benefit the order was

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SANGA'PA'
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1873. made ; these could be determined only by 'the Civil Court' ; yet his interference, being unwarranted, was held to have subjected him to an action. In Regular Appeal No. 48 of 1871, cited for the respondent, the Collector had issued an order by which he declared that the first defendant was the sole owner of a *watan*. The plaintiff, having been previously adjudicated to be a half sharer, was held to have "been forced into the Court by the Collector," and to have had a good ground of action against that Officer, though the Assistant Judge below, relying on the cases of *Báláji Joshi v. Dharmá (g)*, and *Sakhárám S. Gadkari v. Kalyán Municipality (h)*, had determined that no suit lay. No pecuniary advantage was attached to the *Pátílki watan* in that case, except the emoluments of the officiating member, to which the plaintiff could not in general succeed, even though elected without the sanction of the Collector (Act XI. of 1843, Sec. 5) ; but the order, purporting to exclude him from the position of a co-sharer, was deemed a substantial infringement of his legal rights, entitling him to a remedy at the hands of the District Judge.

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Section 19 of Reg. XVI. of 1827 imposes on the Collector the duty of recording the land and allowances attached to hereditary offices, which are then guarded against alienation by Section 20. In performing the function thus assigned to him, the Collector practically determined *prima facie*, under the Regulation law, who were the proper holders of the *watan*, from whom he could require the performance of the services attached to it under Section 38 of Reg. XVII. of 1827, and whose failure to perform those services should entail a forfeiture of the *watan*. These latter provisions have been repealed, but they are substantially revived in the rules published by Government under Bombay Acts II. and VII. of 1863. Under Act XI. of 1843, the Collector has to exact the proper duties from hereditary officers, and, under Sec. 4

of the same Act, to determine at least *primâ facie* whether persons claiming to be sharers of a *watan* really are so for the purposes of election or appointment as office-holders. In doing this, the Collector would be guided by the register of *watandárs* made by him or under his orders. The declaration that *A* was sole *watandâr* to the exclusion of *B* would cause *B*'s exclusion by the *Mámlatdâr*, or other officer subordinate to the Collector, at the first opportunity, from actual enjoyment as in Regular Appeal No. 48 of 1871. The Assistant Collector in the present case professed to be acting in the performance of his official duties under a delegation from the Collector according to Sec. 5 of Reg. XVI. of 1827. For his acts in this capacity, an Assistant Collector is expressly made subject by Sec. 6 of the same Regulation to the jurisdiction of the Civil Courts, and the entry, constituting a declaration against the plaintiff's title, must, as against the Assistant Collector, be regarded as an official act. It thus falls within the provisions of Sec. 35 of the Indian Evidence Act, and might be used to destroy or impair the plaintiff's title whenever that should come in question in a Court of law. But any act, which injures another's right and would in future be evidence against him, constitutes a cause of action for him against the wrong-doer (1 Wms. Saunders 346 *b* and cases there cited). The plaintiff might thus have claimed at least nominal damages for an act calculated to injure him, even though no injury had actually resulted; and according to the recognized principles applicable to suits for a declaratory decree, he might seek such a declaration against the Assistant Collector. It was not intended, we apprehend, by the decisions pronounced against a Collector's liability in certain cases, to make the question of jurisdiction generally dependent on the result of a suit in which that officer is made a defendant. It may often be a question of considerable difficulty whether the Collector ought to be made a party or not. If he ought, then the suit ought to be brought in the District Court (this is the Collector's privilege), and would be improperly brought in a Subor-

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dinate Court. It would, therefore, be somewhat of a hardship, if on its turning out that the alleged cause of action against the Collector does not strictly constitute one, and the suit as against him therefore fails, the plaintiff should have to begin his proceedings against a co-defendant over again.

The nature of the plaint as to the parties against whom a remedy is sought, whether in the event it can be obtained or not, is what primarily determines the jurisdiction of the Court. The intention of the legislature on this point must not be allowed to be defeated by any mere evasion, such as the introduction of the Collector into a suit with which he really has no concern, or in which there is no reasonable pretence of a cause of action against him. In such a case, *Fátmá v. Daryá Sáheb* (*supra*) shows that the device will be frustrated as soon as it is discovered, and the cause placed before the proper tribunal at the expense of the plaintiff. But where there was an apparent and reasonable ground for apprehending legal injury from the Collector's proceedings, even though in the end it should turn out that the suit against him cannot be sustained, it is not, according to our view, necessary to annul all that has been done. Much less is this necessary, where, as in the case now before us, damage to the plaintiff's right might at any moment arise from the act complained of. Analogies, supporting the conclusion we have thus arrived at, may be drawn from several of the placita collected in Comyn's Digest, Title Courts (2) on the jurisdiction of the Court of Exchequer, and Bacon's abridgment on the same subject.

The Assistant Collector has not appealed from the decree pronounced against him. This must be taken as an acquiescence on his part in the decree and consequently an admission of the jurisdiction of the Assistant Judge over the cause. On this an objection was taken by the respondent that the present appellant, Sangápá, could not raise the question of jurisdiction which the Assistant Collector had waived. The Assistant Judge's decision had proceeded, it was said, on no ground common to both the defendants except that of Bhim-



angowdá's ownership of the *watan*, and this question alone could be argued in seeking a reversal of the decree as it affected the Assistant Collector, whose act alone had given occasion to the suit. But a Court, in dealing with a case on the merits, implicitly determines, even when the question has not been expressly raised, that it has jurisdiction over all the parties whom it retains before it, and this is a ground common to all the parties affected by its judgment, differing from other grounds only in this, that an objection based on it may be taken at any stage of the proceedings in the cause. It was open, therefore, to Sangápá to object to the jurisdiction of the Assistant Judge, though, for the reasons we have already given, we think that the objection has not been sustained; but the Assistant Collector's abstinence from appeal may be taken as an admission that, apart from the question of jurisdiction, he considered that a case had been made out against him, and that, therefore, there was at least a cause of action against him set forth on the face of the plaint, which ought otherwise to have been rejected. The cause of action was an act by which Bhimangowdá was to benefit to the injury of Sangápá. If the Assistant Collector's proceeding was, as has now been contended by the appellant, purely futile and inoperative, there was no reason why he should have maintained it against the plaintiff. He has maintained it, and to the end of upholding an interest asserted by himself against that set up by the plaintiff. He cannot now, therefore, rely on *Balavá v. Shidgowdá* (*supra*) to show that there was no cause of action against himself. For the purposes of a declaratory suit, there was a good cause of action set forth in the plaint, and one substantially identical as against each of the two defendants. But it has also been disposed of on a ground common to both, and it is thus open to Sangápá alone to challenge the decision on behalf of the Assistant Collector as well as of himself.

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It becomes necessary, therefore, to determine whether, on the evidence, the decision of the Assistant Judge in favour

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of Bhimangowdá's ownership of the *watan* can be sustained. The oral testimony is meagre and in some instances manifestly prejudiced. It must be tried by the touchstone of the documents, as to the authenticity of which there is much less room for reasonable doubt. Several witnesses depose to an actual possession of the *pátílki watan* by the plaintiff Bhimangowdá's family for two generations. As to whether the duties performed were those of the Revenue or of the Police *Pátílship*, the witnesses differ. It appears from the statements that Shidápá officiated in one of the offices for 10 or 12 years, and this Shidápá deposes that he received his appointment as Police *Pátíl* from Malápá the father of the appellant, Sangápá, and officiated for 20 years. Hé, however, admits that the plaintiff held the *watan* land. Kásiráv (35) deposes that he officiated as Revenue *Pátíl* on the appointment of Jangamáppá, the appellant's grandfather, from 1235 to 1244 Phasli. He states also that this Jangamáppá (*Desái*) always employed substitutes for the performance of his *watandár* duties as *Pátíl*, though he used sometimes himself to sign the accounts. His statement, that the land attached to the *Pátílship* was first given by Jangamáppá to the plaintiff's father, Mariápá, rests only on the report of his father. The weakness of such testimony as this is obvious. It would not be safe to pronounce decisively on the title without something much more satisfactory to rely upon. The documentary evidence, however, takes us back to 1236 Phasli (A.D. 1827-28). In document, No. 44, Jangamáppá's name appears in that year as Officiating *Pátíl* with Mariápá as "nisbat *Pátíl*," i. e., as the servant or deputy of the *Pátíl*. In document, No. 43, Jangamáppá's name is entered separately as holder of the *Desái's* and of the *Pátíl's* lands—of the latter as officiating *Pátíl*. In the series of official documents, which bring the evidence down to a recent period, Mariápá appears to be entered almost invariably as holder of the *watan* "nisbat *Pátíl*," and not as an independent owner. In some of the *Láwani Chittis* or lists of fields cultivated, Malápá's name is entered without

that of Mariápá (50, 51, &c.). In some, Kásiráv's name is entered as the *Kárkun* of Malápá (52, 55). But what are more conclusive than those documents are the papers (59-62) signed by Bhimangowdá himself as "nisbat Pátíl." The *watan* holding is thus traced into the possession of the plaintiff's father, and it is made clear that the possession was not originally that of an independent owner holding adversely to the *Desái* family now represented by Sangápá. Mariápá took the land as an assistant or 'nisbat Pátíl,' and though it has now been held for more than 40 years by him and his sons, they have continued to perform the duties or some of the duties implied in the designation 'nisbat Pátíl.' They could not change the character of their possession by mere continuance of enjoyment, and the independent title to the *watan* asserted by Bhimangowdá cannot, on the evidence, be sustained. We, therefore, reverse the decree of the Assistant Judge with costs.

PINHEY, J., concurred.

Decree reversed with costs.

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[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 9 of 1873.

HARI RA'MCHANDRA *Appellant.*

VISHNU KRISHNA'JI *Respondent.*

Suit against a Police Officer—Limitation—Act XIV. of 1859, Section 1, Clauses 2 and 16, and Sections 3 and 14—Bombay Act VII. of 1867, Section 42.

H. sued a police constable for damages for having made a false report against H. The plaint was filed on the 6th May 1872 in the Court of the Subordinate Judge at Malwan. On the 5th August 1872, the Subordinate Judge rejected the plaint on the ground of want of jurisdiction, under Sec. 32 of Act XIV. of 1869. On the 7th August 1872, H. filed a fresh plaint in the District Court of Ratnagiri, but the Judge rejected it on the ground that the claim was barred under Section 42 of Bombay Act. VII. of 1867.

In special appeal, the High Court affirmed the Judge's order, holding that Sec. 3 of Act XIV. of 1859 cannot be regarded as rendering Sec. 14 of the same Act applicable to Sec. 42 of Bombay Act VII 1867.

THIS was an appeal against the order of H. Birdwood, District Judge of Ratnagiri.

The facts of the case fully appear from the following judgment of the Judge :—

"This is a plaint against a Police officer claiming damages for a false report made regarding the plaintiff by such officer to the Subordinate Magistrate. The false report is alleged to have been made on the 7th February 1872. On the 24th March 1872, the plaintiff gave notice of the suit to the defendant, and on the 26th March 1872, to the Superintendent of Police. He presented his plaint in the Subordinate Judge's Court at Malwan on the 6th May. 1872, and the plaint was rejected on the 5th August instant, on the ground that the Court had no jurisdiction under Section 32 of the Bombay Courts Act, XIV.

of 1869. This plaint was presented in this Court on the 7th August. The period of limitation applicable to the case is three months (Section 42 of Bombay Act VII. of 1867), i.e., three calendar months (Section 1, Clause 4, of Bombay Act X. of 1866). The last day on which the plaint could be filed was, therefore, the 7th May 1872. If the period occupied in presenting the plaint in the Lower Court and receiving it back (i.e., from 6th May to 5th August) could be deducted from the time which has elapsed since the 7th February 1872, then the plaint might be admitted in this Court on the 7th August (the plaintiff having two days to spare after the 5th May, if the 6th and 7th May are allowed him; and the plaint was filed within two days from the 5th August, when the Lower Court rejected the plaint). As, however, Section 14 of Act XIX. of 1859 applies only to cases provided for in that Act, I do not think that the time from 6th May to 5th August can be allowed.

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"I find that the claim is barred by limitation. Plaint rejected."

The appeal was argued before WESTROPP, C.J., and MELVILL, J.

Ghánashám Nilkanth for the appellant:—The Lower Court, in computing the period of limitation, did not take into consideration the time occupied in the Court of the Subordinate Judge. The period of limitation applicable to an action like the present, is that provided by Sec. 1, Cl. 2 or 16, and although under Sec. 3 of that Act, a shorter period is specially prescribed by Bombay Act VII. of 1867, Sec. 42, yet the principle of computation laid down by the general Limitation Act is not changed, and under Sec. 14 of that Act, the plaintiff is entitled to have all the time occupied in the first Court, deducted from the time which has passed since the accruing of the cause of action.

No one appeared for the respondent.

PER CURIAM:—We are unable to hold that the possible applicability of Section 3 of Act XIV. of 1859 to Sec. 42 of

1873. Bombay Act VII. of 1867 can be regarded as rendering Sec.
 HARI 14 of Act XIV. of 1859 also applicable to Sec. 42 of Bombay
 RA'MCHANDRA v. Act VII. of 1867, and we must, therefore, affirm the order
 VISHNU of the District Judge, rejecting the plaint.
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Order affirmed.

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 SR 2 Bom 231.*

[APPELLATE CIVIL JURISDICTION.]

April 28.

Special Appeal No. 130 of 1871.

TILLAKOHAND HINDUMAL..... *Appellant.*

JITAMAL SUDARA'M *Respondent.*

Rāzindā made for purposes of defeating intended execution—Consideration—Limitation.

D executed a *Rāzindā* in favour of plaintiff on the 20th August 1868, transferring certain lands to the latter. Plaintiff, after passing the usual *Kabulāyat* to the Collector, was put in possession of the lands in question. On the 7th April 1869 *T* obtained a money decree against *D*, and on the 3rd July 1869 attached the lands as belonging to *D*.

Held that if the *Rāzindā* were a real transaction made for a valuable consideration, although entered into with the intention of defeating the execution of the money decree, the title of plaintiff under that *Rāzindā* would prevail.

A sale or mortgage, if real, though made for the purpose of defeating an intended or probable execution, is valid against the execution creditor. But if it be only a colourable transaction, not intended to confer upon the vendee or mortgagee any beneficial interest in the property, but simply to substitute such vendee or mortgagee as a nominal owner in lieu of the real owner (the judgment debtor), with the object of saving the property from execution, the vendee or mortgagee is a mere trustee, and the judgment creditor is entitled to attach and sell the property.

A decree of 1862, which plaintiff held against *D*, though time-barred in 1868, was (being then still unsatisfied) *held* to afford a good consideration for *D*'s *Rāzindā* in 1868 in plaintiff's favour.

An executor may pay a debt justly due by his testator though barred by the Statute of Limitation, and will in equity be allowed credit for such payment.

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The general rule of law is that a consideration merely moral is not valuable consideration, such as would support a promise. But there are instances of enforceable promises which formerly were referred to the now exploded principle of previous moral obligation, and which are still held to be binding, although that principle has been rejected. Amongst those instances is a promise *after full age* to pay a debt contracted during infancy, and a promise in renewal of a debt barred by the law of Limitation. The efficacy of such promises is now based upon the principle that where the consideration was originally beneficial to the party promising, and he be protected from liability by some provision of the Statute or Common Law meant for his advantage, he may renounce the benefit of that law, and if he promise to pay the debt, he is bound by the law to perform that promise.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge at Poona, reversing the decree of the Subordinate Judge of Talagaum, and was argued before WESTROFF, C.J., GIBBS and WEST, JJ., on the 19th July 1871.

Dhirajál Mathurádás for the appellant.

Vishnu Ghanashám for the respondent.

The facts and arguments sufficiently appear from the following judgment:—

Our. adv. vult.

26th July 1871, WESTROFF, C.J.:—The lards in dispute in this suit were mortgaged in 1867 by Dhondi Essáji to the defendant, Tillakchand Hindumal, who brought a suit against the mortgagor, Dhondi Essáji, and obtained a decree in that suit upon the 2nd September 1868. No process of execution was, under that decree, laid upon the mortgage lands in question, but the amount of that decree was paid off in 1869; in what month such payment was made, we are not informed and the Vakils do not agree. The appellant's Vakil says, in September 1869, the respondent's Vakil says, in March 1869.

1873. On the 20th August 1868, the mortgagor, Dhondi Essáji executed a *Rázinámá* in favour of the present plaintiff, Jitamal Sudarám. A *Kabuláyat* was executed to the Collector on the same day by Jitamal Sudarám, the plaintiff; and he, under these documents, obtained possession of the lands in dispute. In March 1869, the defendant brought a fresh suit against Dhondi Essáji in respect of a debt not secured upon the lands in dispute, and obtained a decree on it on the 7th April 1869. Under that decree, the defendant caused the lands in dispute to be attached upon the 3rd July 1869. The present suit is brought by Jitamal Sudarám, the plaintiff, to raise that attachment and to have his title to the lands declared. He not only relied in the Courts below upon the *Rázinámá* and *Kabuláyat* of the 20th August 1868, but also upon a *Karárnámá* (Exhibit No 4) executed by Dhondi Essáji, purporting to transfer the lands in dispute to the present plaintiff, and to be dated 18th September 1865, which *Karárnámá* both of these Courts, apparently with good reason, held to be fraudulent. The Subordinate Judge made a decree in favour of the defendant, the execution creditor (the present appellant). The Acting Assistant Judge, however, reversed that decree. Whether he was right in so doing or not, he has not found all of the facts necessary to enable the Court to determine. The issue which he laid down, viz: "Has the plaintiff proved his right to the land?" is too wide, at least there ought to have been one or more subsidiary issues. A passage in his judgment leads us to doubt whether he perceived with sufficient clearness the legal bearings of the case, so as to enable him to discern the most important question in it. After stating the satisfaction of the mortgage debt due to the defendant, the Acting Assistant Judge says: "But in March 1869, the defendant filed a suit against Dhondi to recover a debt (having no connection with this land) and obtained a decree, in execution of which he attached these fields, and unless the defendant can show that Dhondi's *Rázinámá* of August 1868 (which cannot be gainsaid) was fraudulently executed to keep his property from being attached in execution of the

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decree of 1869, then he must fail in his cause. And this, it stands to reason, he cannot prove." What precisely is the scope of the Acting Assistant Judge's statement, that the *Rázinámá* cannot be gainsaid, is not clear. He may only mean that its execution cannot be gainsaid or its execution and the plaintiff Jitamál's possession under it cannot be gainsaid. But, as will be presently seen, a finding to either of these effects would not alone be sufficient for the plaintiff, so as to entitle him to succeed. And, on the other hand, the establishment of the point, the *onus* of which the Acting Assistant Judge has thrown upon the defendant, would not be sufficient to entitle him to a decree. The *Karárnámá* of 1865, which is found to be fraudulent, may possibly have been concocted, not only for the purpose of supporting the *Rázinámá* and *Kabuláyat* of 1868 and of thereby ousting the defendant's claim under his mortgage of 1867, but also for the purpose of defeating the execution of any decree which the defendant might thereafter obtain in respect of his unsecured debt. As against the defendant, in his character of mortgagee, it is quite clear that such a transaction could not stand, even if the *Rázinámá* had been executed for valuable consideration. And this would be so, because, as mortgagee, he had a special lien on the land prior to any right which the later *Rázinámá* and *Kabuláyat* could confer upon the plaintiff, the *Karárnámá*, which purported to be of a prior date to the mortgage, being of no avail, as being a fictitious, fraudulent, and unregistered instrument. But as against the defendant, claiming under his common money decree of the 7th April 1869, the title of the plaintiff under the *Rázinámá* and *Kabuláyat* may prevail, if the *Rázinámá* were a real transaction made for a valuable consideration, although so made with the intention of defeating the execution of the money decree which the defendant might obtain against Dhondi Esáji. Such is the effect of the decisions in *Eveleigh v. Purssord* (a), *Wood v. Dixie* (b), and *Hale v. The Saloon Omnibus Company* (c). The transaction

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(a) 2 Moo. & Rob. 539.

(b) 7 Q. B. 892.

(c) 4 Drewry 492.

1873. if real, although entered into for the purpose of defeating an intended or probable execution, is valid against the expected execution creditor, whether the mode of defeating him be a sale or a mortgage. As to a sale, see the cases already cited; as to a mortgage, see *Darvill v. Terry* (d), *Sankarappa v. Kamayya* (e).

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But if the sale or mortgage be only a colourable transaction, or a mere sham, and not intended to confer, upon the alleged grantee or mortgagee, any beneficial interest in the property, and simply (for the purpose of screening it from execution) to substitute such grantee or mortgagee as nominal owner in lieu of the real owner (the debtor), and to make such nominal owner nothing more than trustee for the real owner (the debtor), and thus to endeavour to preserve the property for the latter, such a sale or mortgage would be invalid as against the creditor, and he would be entitled to attach and sell the property. Section 205 of the Civil Procedure Code renders all property, moveable or immoveable, belonging to the execution debtor, "whether the same be held in his own name or by another person in trust for him or on his behalf," liable to be taken in execution. In *Eveleigh v. Purssord* (*supra*), Baron Rolfe, in putting the case to the jury, said: "The question for the jury to determine was, whether, on the whole, they were satisfied that the bill for the sale was intended to have operation in favour of the plaintiff and to confer upon him right, to be exercised at his pleasure over the property; if so, they ought to find for the plaintiff" (alleged vendee of the property). If, on the other hand, they thought the transaction was a mere sham, executed colourably and only for the purpose of protecting William Eveleigh (the debtor) against his creditors, and without its being really meant to transfer the goods to the plaintiff, then they ought to find a verdict for the defendant" (the execution creditor). And in

(d) 6 H. & N. 807, S. C. 30 L. J. Exch. 355.

(e) 3 Mad. H. C. Rep. 231.

Darvill v. Terry (*supra*), which was the case of a bill of sale by way of mortgage, the full Court of Exchequer approved of the question submitted to the jury by Baron Channell in a manner similar to that adopted by Baron Rolfe in *Eveleigh v. Purssord*. The same doctrine is to be found in *Twyne's case* (f).

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We must, accordingly, direct that the following issue be tried, viz.: "Whether, by the execution of the *Rázinámá* and the *Kabuláyat*, it was intended and agreed, at the time of such execution, by Dhondi Essáji in favour of the plaintiff Jitamal Sudarám, that the latter should take any beneficial interest in the lands in dispute, or whether, on the contrary, the execution of the said *Rázinámá*, and *Kabuláyat* was merely a colourable transaction for the purpose of screening the said lands from execution in an expected or pending suit to be brought or then actually brought by the present defendant, Tillakchand Hindumal, against the said Dhondi Essáji, and with the intention that the said Jitamal Sudarám should hold the said lands in trust for the said Dhondi Essáji."

The Court, which tries the above issue, should take such further evidence, as may be legally admissible, which the parties on either side may offer, or which the Court may think necessary to enable it to come to a satisfactory finding upon that issue. The Court should, within three calendar months from the receipt of the papers in this cause, make its finding and report the same together with the reasons for it to this Court. The *onus* of proof, that the transaction was real and not merely colourable, must be placed upon the plaintiff. The circumstance that the plaintiff was, in or about the time of the execution of the *Rázinámá* and *Kabuláyat*, put into possession of the lands by Dhondi Essáji, is some, but not by any means conclusive, evidence of the genuineness of the transaction. It is quite possible that he was put into possession merely as a trustee for Dhondi Essáji and not for his

(f) 3 Rep. 80 b, 81. a (212 of Fraser's Ed.) S. C. 1 Sm. L. C. 1, 2.

1873. (plaintiff's) own benefit. The Court should, in trying the
 TILLAKCHAND above issue, and as a matter subsidiary thereto, specially direct
 HINDUMAL its attention to the question whether any *valuable considera-*
 v. *tion* passed from the plaintiff, Jitamal, to Dhondi Essáji for
 JITAMAL the execution by the latter of the *Rázinámá*, and should find
 SUDARÁM. and report to this Court what such valuable consideration
 was. If there were valuable consideration given or promised
 by the plaintiff, Jitamal Sudarám, to Dhondi Essáji at the
 time of the execution of the *Rázinámá* for the same, it will
 be a circumstance strongly favouring the conclusion that
 Jitamal Sudarám took a beneficial interest in the transaction,
 and was not merely a trustee for the lands for Dhondi Essáji.
 In connection with this part of the case, it will be desirable
 that the trying Court should investigate and report the circum-
 stance relating to the payment to the defendant in 1869 of the
 amount due to him in respect of his mortgage of 1867, and
 the decree upon it, and should ascertain from whom the money
 was obtained for such payment, and when that payment was
 made. We reserve all other questions between the parties in
 this suit.

The above directed issue should be tried by the District
 Judge or his Assistant Judge at the option of the former.

The papers relating to the satisfaction of the decree of the
 2nd September 1868 upon the mortgage of 1867, should be
 sent up to this Court with the finding on the said issue.

The following finding was returned by S. Tagore, Assistant
 Judge at Poona, to the issue sent down by the High Court :—

“ My finding on the issue is that the execution of the
Rázinámá and *Kabulayat* was a real transaction and not a
 mere sham, and it was intended, at the time of such execution,
 that the plaintiff, Jitamal, should take a beneficial interest in
 the lands in dispute.

“ My reasons are as follow :—1. The transaction is sup-
 ported by valuable consideration. It appears that Jitamal
 obtained a decree against Dhondi for Rs. 74-13-9 in 1862,

and that the lands in dispute were transferred by Dhondi to the plaintiff, Jitmal, in compromise of the latter's claim under that decree. The decree has been produced since this remand and is recorded'' * * * * *

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To the above finding, it was objected on behalf of Tillakchand that the Assistant Judge was wrong in considering that the transaction in question was supported by valuable consideration, whereas, according to law, Dhondi was not bound to pay off the debt due on account of the decree of 1862.

The appeal was again argued before WESTROPP, C.J., and WEST, J., on the 28th April 1873.

Dhirajlál Mathurádás against the finding.

Vishnu Ghanashám in support of the finding.

WESTROPP, C.J. :—The first objection taken on behalf of the appellant, Tillakchand, to the finding of the Assistant Judge (Mr. Tagore), is the only one of the three objections worthy of notice. The second and third are merely objections to his appreciation of the evidence and involve no question of law.

The first objection is that the Assistant Judge was in error in supposing that the debt due under the decree, obtained by the plaintiff, Jitmal Sudarám (respondent), on the 24th March 1862, for Rs. 74-13-9, against Dhondi Essáji and Rámá, son of Dádá Essáji, in respect, it is said, of a debt due to Jitmul Sudarám by Essáji, father of Dhondi and grandfather of Rámá, constituted a valuable consideration for the transaction in 1868 evidenced by the *Rúzinímá* and *Kabul-áyat* of the 20th August 1868. The decree, being then far more than three years old, and no execution having been shown to have been issued upon it, was, it was argued, then barred by Section 20 of Act XIV. of 1859.

H. H. Thompson

Assuming this to be so, it was quite open to Dhondi to pay or compromise the debt, whether he be regarded as the

1873. debtor or as the representative of the debtor. An executor
 TILAKCHAND may pay a debt justly due by his testator, although barred by
 HINDUMAL the Statute of Limitations, and will, in equity, be allowed
 v. credit for such a payment: *Norton v. Frecker* per Lord
 JITAMAL Hardwicke (g) ; *Stahlschmidt v. Lett* (h) ; and is not, in an ac-
 SUDARMA. tion at law for the debt, bound to plead that statute. See the
 91 R 2 Bom. 121. authorities collected in 2 Wms. on Executors, pp. 1802 and
 1803, 7th edition. A previous debt is a valuable considera-
 tion for a conveyance, as held in the second resolution in
Twyne's case (i), where it was not the want of consideration,
 but the want of *bonâ fides* which invalidated the conveyance,
 it being coupled with a secret trust for the grantor.

The general rule of law, no doubt, is that a consideration merely moral is not a valuable consideration, such as would support a promise *Eastwood v. Kenyon* (j) ; *Beaumont v. Reeve* (k) ; but there are some instances of promises, which it was formerly usual to refer to the now exploded principle of previous moral obligation, and which are still held to be binding, although that principle has been rejected. Amongst those instances is a promise after full age to pay a debt contracted during infancy, and a promise (in writing) (l) in renewal of a debt barred by the Statute of Limitations. The efficacy of such promises is now referred to the principle that a person may renounce the benefit of a law made for his own protection. It was laid down "that where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the Statute or Common law meant for his advantage, he may renounce the benefit of that law ; and if he promise

(g) 1 Atk. 525.

(h) 1 Sma. G. 415.

(i) 3 Rep., 80, b. 81, a. S. C. 1 Sm. L. C. 1, 2.

(j) 11 Ad. & E. 438.

(k) 8 Q. B. 483.

(l) Act XIV. of 1859, Sec. 4 ; 7 Calc. W. Rep. 46, 67 ; 8 Ibid. 289 ;
 6 Bom. H. C. Rep. 67 ; Act IX. of 1871, Sec. 20 ; Act IX. of 1872,
 Sec. 25, cl. 3 ; and in England 9 Geo. IV., c. 14, S. 1 ; 19 and 20
 Vic., c. 97 ; 2 Wms. on Exors., 1945, et seq.

to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." The authorities are collected in Leake on Contracts 317, 318. (As to cases occurring since the 1st of September 1872, see the Indian Contracts Act, IX. of 1872, Sec. 25, cl. 2 and cl. 3, which seem to leave the law unaltered in such instances as the two above given.)

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The responsibility of Dhondi for his father's debt, having been ascertained by decree in 1862, was not affected by Mr. White's Act (Bombay Act VII. of 1866).

Assuming that the decree of 1862 was time-barred in 1868, it, being then still unsatisfied, would nevertheless afford a good consideration for the transaction between Dhondi and the plaintiff, Jitamal, resting on the *Rázinámá* and *Kabuláyat* of August in the latter year. The first objection to the finding of the Assistant Judge (Mr. Tagore) therefore fails, and there being no legal question in the two other objections, we must affirm the decree of Mr. Candy, the Assistant Judge, made on the 10th November 1870, but we give no costs of this appeal to the appellant, inasmuch as the finding of Mr. Candy, that the *Karárnámá* of the 18th September 1865 was fraudulent, renders the plaintiff deserving of this mark of the disapprobation of the Court, and the Court refrains from expressing any opinion as to whether or not it would have concurred in Mr. Tagore's finding on the facts involved in the issue tried by him, had it been open, which it is not, to this Court to enter upon that question.

Decree affirmed.

[APPELLATE CIVIL JURISDICTION.]

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February 19.

Regular Appeal No. 11 of 1869.

THE SUB-COLLECTOR of COLABA and
another *Appellants.*

GANESH MORESHVAR MEHENDALE and
another *Respondents.*

Assessment in perpetuity—Power of Government to raise assessment—Bombay Act I. of 1865, Sec. 25—Regulation XVII. of 1827, Section 4, Cls. 2 and 3.

Where a lease of lands to be reclaimed from the sea by the lessee, granted by a former Government to plaintiff, stipulated that the lands should be held free of assessment [*maphi*] for thirty-years, subject to assessment at Rupee 1 per *bigha* in the 31st year, to assessment increasing at the rate of $\frac{1}{4}$ of a Rupee per *bigha* during the six following years, and at the expiration of that *istava* (period of annually increasing assessment) should be held at the full assessment of Rs. 3 per *bigha* ;

Held that after the expiration of the first thirty-seven years the lease was one in perpetuity, subject to the annual payment of the sum named as the full assessment and no more.

The words in Section 25 of Bombay Act I. of 1865 confer upon Government no absolute power in all cases to fix any assessment they may please. But that section, as also Section 4, Clause 2, Regulation XVII. of 1827, distinctly limit the power of Government to raise the assessment on land held partially exempt by right. Government, however, may set aside such limitations at their discretion by a Legislative enactment, as provided by clause 3 of the above Regulation. But Government can exercise this power only under "specific" rules.

In Bombay Act I. of 1865, Sec. 25, no such "specific" rules are to be found as would indicate that the Legislature intended to set aside the provisions of Cl. 2, Sec. 4, Regulation 1827, and to enable the Revenue officers to ignore all exemptions except those which they may themselves choose to recognize,

Where plaintiff had enjoyed "Savai Sut" or a remission of one-fourth for a period of more than thirty years with respect to lands on which assessment became leviable in 1805 A.D., he was held by the High Court to have established a prescriptive right to such a remission.

THIS was a regular appeal from the decision of A. Bosanquet, Acting District Judge at Tanna, in Original Suit No. 30 of 1865.

The appeal was argued before SARGENT, Acting C.J., and MELVILL, J., on the 15th January 1873.

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Mayhew, Legal Remembrancer, (with him *Dhirajlál Mathurádás*, Government Pleader,) for the appellants.

Macpherson (with him *Vishvanáth Náráyan Mandlik* and *Ganpatráv Bháskar*) for the respondents.

The facts of the case will sufficiently appear from the following judgment :—

Cur. adv. vult.

19th February 1873, MELVILL, J. :—This is in effect an action to restrain the Government from raising the assessment on certain lands held by the plaintiffs, and to recover excess assessment levied from them in the years 1863-64 and 1864-65.

The land is held under 5 *kauls* or leases granted by the former Government. It will be sufficient to state precisely the conditions of one of these documents ; for, though the others differ from it in numerical details, their substance is, in all material points, precisely the same.

Exhibit No. 4 is a lease granted in the year A.D. 1809. It sets forth that the grantee had come to the Sarkár, and represented that if a lease, on certain favourable terms, were granted to him, he would undertake to embank, and so reclaim from the sea, certain land which was inundated by the tide and overgrown with wild vegetation ; and that, in order that the land might be brought under cultivation, and yield a revenue to Government, it had been determined to comply with the request. Accordingly, an officer had been sent to measure the land, but it had been found impossible to do this with any accuracy on account of the denseness of the vegetation and the marshy character of the ground. On a rough estimate, however, the whole area was taken to be 121 *bighás*

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from which 41 *bighás* were deducted on account of creeks, ditches, and marsh, leaving a balance of 80 *bighás*. From this, one fifth, or 16 *bighás*, was again deducted on account of "Savái" (the meaning of this term and the intention of the deduction will be considered presently), leaving a final balance of 64 *bighás* as the estimated extent of the grant. Then follows a detailed estimate of the expense of reclamation, amounting to Rs. 8,261; and finally are set forth the terms of the grant. The land is to be held free of assessment for 30 years. In the 31st year, it is to pay an assessment of 1 rupee per *bighá*; during the succeeding six years, the assessment is to be increased by a quarter of a rupee annually; and the seventh year is to be a year of full assessment at the rate of three rupees per *bighá*.

The main contention between the parties is as to the right which the plaintiffs claim, to hold the land in perpetuity under this and the other leases at the rates specified therein as the full assessment. That portion of Exhibit No. 4, which bears upon this point, is as follows: "In accordance with the above, for six years [there shall be] an annually increasing assessment [*istawa*] and the seventh [year shall be] a year of full [assessment]. The regular assessment (*ain dast*) has been agreed for at the rate of three rupees per *bighá*. The land assessment [being agreed for] to be levied according to the money payment system (*i.e.*, as distinguished from payment in kind), an agreement has been made for [the levy of] the regular assessment at Rs. 3 per *bighá*. Now on the expiry of the [term of] thirty-seven years as above [partly] of [*máphi*] exemption from assessment [and partly of the imposition of] the annually increasing assessment [*istawa*] the salt ground will be surveyed every year, and payment will be received every year according to the above system for the cultivated land which will be entered in the land survey [books] as brought under cultivation."

Exhibit 5 is a lease granted in the same year, and on similar terms, extending over the same period of 37 years. The

only material difference is that the full assessment in the 37th year is fixed at 4 rupees per *bighá*.

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In Exhibit 6, which is a lease granted in the year 1791, the full assessment, which was to be levied after 20 years, is 5 rupees. The words of this lease, importing that the assessment is to be levied at this rate annually, are very clear: "After the expiration of the 'Istawa,' the regular 'sherasta' at the rate of Rs. 5 per *bighá*. * * * shall be recovered from year to year."

Exhibit No. 7, a lease granted in 1813, contains similar terms:—"After the expiration of the 'Istawa,' from the thirty-sixth year, [assessment] is to be recovered at the rate of Rs. 5 per *bighá* annually."

Exhibit No. 8, granted in 1814, contains the following:—"After the expiration of the 'Istawa,' from the thirty-sixth year, you should pay [the assessment] at the regular 'sherasta,' at the rate of Rs. 5 per *bighá*."

The words, which we have quoted from the leases, leave little room for doubt that the intention of the parties was that the sum named as the full assessment, and no more, should be charged in perpetuity. It is contended for the Government that the term "the full assessment" must be understood as meaning the full assessment for the time being, and that the intention was that the land should be held on exceptionally favourable terms for a certain number of years only, and should be then assessed at the same rate as other similar land in the same district. But, if so, why was the amount of the full assessment specified at all? To this the answer given is that the rates specified were the rates in force at the respective times when the leases were granted. But how could it have been assumed that the ordinary rate of assessment at the end of 37 years, or any other period, would be neither more nor less than at the time the leases were grant-

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ed ? or how can it be said that Rs. 3 or Rs. 4, or any other rate, was the ordinary assessment at the date of the leases on salt land, inundated by the sea, over-run by wild vegetation, and unfit for cultivation ? Or finally, how are we to explain the two different rates of Rs. 3 and Rs. 4, specified in the two leases, Exhibits 4 and 5, which were granted in the same year, and for the same number of years, and relate to precisely the same description of land ? There can be little doubt that the true explanation is to be found in the difference in the amount to be expended in reclamation, which would naturally be regarded as a ground for greater or less indulgence to the lessee. Thus, under the lease No. 4, Rs. 8,261 was the estimated expenditure, and the full assessment is fixed at the low sum of Rs. 3. In the lease No. 5, the estimate of cost is Rs. 6,980, and the assessment is Rs. 4. In the other leases, the land evidently required less costly works of reclamation, and the assessment is fixed at Rs. 5.

Looking at the matter in this light, we must regard the difference between the rates fixed in the leases and the assessment now paid on similar lands as part of the consideration for a contract mutually beneficial to the lessor and the lessee. The benefit to the lessor is well described in the lease No. 5, and is clearly indicated in the other leases also :

“Taking into consideration that without the embankment the Government is losing its revenue, and that you are prepared to contribute to the Government revenue by spending money out of your own pocket, and having in view the bringing of the land under cultivation, you are hereby permitted to build an embankment to the *Khár* at the village aforesaid.” The consideration to the lessee for his risk and expense was an exemption from assessment for a certain number of years, and a guarantee that in subsequent years his assessment should not be raised. Now that the lessee has performed his part of the contract, how can the Government be allowed to draw back from theirs ? It would be contrary to all principle to allow them to do so, unless, as

has been contended, the words of the law, under which they profess to act, give them an absolute power in all cases to fix any assessment they may please. But the words of Section 25 of Bombay Act I. of 1865 confer no such absolute power. That section contains the following proviso: "Provided that it (the assessment) shall not be leviable from any land held and entered in the land registers as wholly or partially exempt from payment of land revenue except to such amount as is in accordance with previous practice, or any law which has been, or may hereafter be, enacted, relating to lands so held." The lands now in question have hitherto been held at a certain fixed assessment, the amount of which has of course been entered in the land registers. It may be that hitherto the land registers have not shown any entry, distinctly declaring the lands to be "partially exempt from payment of land revenue." The reason of that may be that the rate of assessment fixed upon them has not hitherto been less than the ordinary rate of assessment. But however this may be, the words of Cl. 2, Sec. 4, Regulation XVII. of 1827, (and we may observe that, at the time when the rates complained of received legal sanction under Section 3 of Bombay Act I. of 1865, that Act formed part of the Regulation), are very clear and express and distinctly limit the right of Government to raise the assessment on land held by right partially exempt. Cl. 3 of the same section, no doubt, states that the Government may set aside such limitations on the exercise of its discretion by a legislative enactment—a power which it would of course possess, even if there were no such statement. But this clause requires that any rules having such an effect should be "specific." And reading Section 25, Bombay Act I. of 1865, in conjunction with Cl. 2, Sec. 4, Regulation XVII. of 1827, we are unable to find in the former section such specific terms as would indicate that the Legislature intended to set aside the provisions of the latter clause, and to enable the revenue officers to ignore all exemptions except those which they may themselves choose to recognize.

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We are of opinion and decide that the lands in question are partially exempt, in so far that they are only liable to assessment at the rates specified in the leases. It remains to consider the plaintiffs' claim to hold one-fifth of the lands altogether free of assessment.

This claim is founded upon the circumstance that in the leases Nos. 4 and 5, a deduction of one-fifth (*savái*) is made from the estimated area of the lands, and the balance only is entered as the extent of culturable land granted. From this, it is argued that it was the intention to grant one-fifth of the lands free of assessment, and the same exemption is claimed in regard to the lands held under the leases Nos. 6, 7, and 8, though no mention of 'Savái' is made in them. But it is clear from the terms of the leases Nos. 4 and 5, that the deduction of 'Savái' is made not because there was any intention of exempting from assessment any of the culturable land, but simply because it was impossible to ascertain at the time how much culturable land there was. The deduction is made simply as a correction of error in the necessarily imperfect measurements. It occurs only in that part of the leases which sets forth the details of the measurements (which are really as superfluous, so far as the terms of the leases are concerned, as the details of the projected expenditure), and it is not alluded to in the operative part of the leases, which, on the contrary, provides for an annual measurement of the land under cultivation and the levy of a uniform assessment upon the whole of such land. The claim of the plaintiffs to the deduction cannot, therefore, be maintained on the ground that it is granted to them by the leases. Can it then be maintained on the ground of prescription? It is in evidence that 'Savái sut,' or a remission of one-fourth, was made to the plaintiffs on all the lands held by them up to the introduction of the survey in 1862-63. In order that the plaintiffs may establish a prescriptive title to this remission, which they have enjoyed without right, they are bound to show that they have enjoyed it for 30 years. It is clear that they cannot make out their case in regard to the lands held

under any of the leases except No. 6 ; for the date at which assessment first became payable under the other leases all occurred within 30 years preceding the introduction of the survey. Under the lease No. 6, however, assessment became leviable in A.D. 1805, so that the plaintiffs have enjoyed the exemption claimed in respect of the lands mentioned in this lease for nearly 60 years ; so far therefore as these lands are concerned, and so far only, they must be held to have established a prescriptive title.

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We amend the decree of the District Court and declare that the plaintiffs are entitled to hold in perpetuity the lands specified in the leases, Exhibits 4 and 8, on payment of assessment on the whole of the culturable land mentioned in the leases Nos. 4, 5, 7, and 8, and four-fifths of the culturable lands mentioned in the lease No. 6, at the following rates, viz., Rs. 3 per *bighá* under the lease No. 4, Rs. 4 per *bighá* under the lease No. 5, Rs. 5 per *bighá* under the leases Nos. 6, 7, and 8.

And we further direct that the defendants do pay to the plaintiffs all sums levied by them as assessment for the years 1863-64 and 1864-65 in excess of the sums which should have been levied in accordance with the terms of this decree. The amount due will be determined at the time of execution of the decree.

The defendants will bear all costs in the District Court. The parties will bear their own costs in appeal.

Decree amended.

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March 26.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 31 of 1872.

KA'VASJI SORA'BJI*Appellant.*

BARJORJI SORA'BJI and BA'PUJI SORA'BJI...*Respondents.*

Suit against the representatives of a deceased person—Substitution of parties—Limitation—Sec. 14, Act XIV. of 1859.

Where a plaint is filed before the expiration of the period of limitation prescribed by Act XIV. of 1859, against persons whom the plaintiff erroneously supposes to be the representatives of his deceased debtor, and after such period has expired, obtains leave to amend his plaint by substituting the true representatives as defendants ;

Held that his claim is barred.

THIS was a regular appeal from the decision of Mukundrai Monirai, First Class Subordinate Judge of Surat, in Original Suit No. 1571 of 1869.

Kávasji Sorábji brought this suit against Dosábhái Barjorji and Mánikji Bápuji, two minors (the present defendants Barjorji Sorábji and Bápuji Sorábji being named in the plaint as guardians merely) to recover Rs. 8,830 being principal and interest due on an agreement of compromise entered into between the plaintiff and Sorábji Mánikji, grandfather of the minors and father of the guardians Barjorji and Bápuji. The plaintiff laid his cause of action on

Act XIV. of 1859, Sec. 14 : " In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bond fide*, and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation."

the 9th December 1866, and alleged that he sued the minors Dosábhái and Mánikji, because Sorábji had appointed them as his heirs (residuary legatees) by a will.

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The guardians, Barjorji Sorábji and Bápuji Sorábji answered that the minors were not Sorábji Mánikji's heirs, and produced two wills, dated, respectively, the 22nd January 1867 and the 13th November 1867; showing that although under the former will the minors Dosábhái and Mánikji had been appointed Sorábji's heirs (devisees), that will was revoked by the subsequent one of the 13th November 1867, by which the guardians Barjorji and Bápuji were appointed heirs (devisees). The plaintiff thereon applied on the 22nd February 1870 to the Court that the guardians Barjorji Sorábji and Bápuji Sorábji should be made defendants in substitution for the minors. The Court, on the 4th April 1870, ordered them to be so substituted as defendants. Barjorji and Bápuji objected that their substitution was illegal, and that the claim was barred as against them, inasmuch as the claim must be considered to have been instituted against them on the 4th April 1870, when their names were ordered to be substituted, that the cause of action accrued on the 9th December 1866, and a period of more than three years had elapsed since that date. The Subordinate Judge, although he rejected the claim on the merits, decided the issue of limitation in the plaintiff's favour. The following are his reasons:—

“ There is no dispute about the plaint having been presented within the time allowed by the law of limitation, but the defendants rest their objection on the ground that the time from the date on which the debt became due, to the day on which the plaintiff presented the petition, substituting their names, is more than three years, and that therefore this claim as against them is barred. From the circumstances of the case, as they are at present, the plaintiff does not appear to have been aware of the second will. Had he known, at the time he presented the plaint, that such a document was in existence, he would have at once sued the defendants, and

1873. there would have been no necessity for his applying for the substitution of the defendants' names. The time, therefore, during which he was promptly prosecuting his claim should be equitably allowed him (*Vide* the case of *Mohan Chand Kandu v. Azim Kazi ow Chkilar (a)*)."

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The appeal was argued before WESTROPP, C.J., and KEMBALL, J.

Farran (with him *Nánābhāi Haridās*) for the appellant.

Anstey (with him *Khandarāv Moroji*) for the first respondent.

Vásudev Jagannāth for the second respondent.

WESTROPP, C.J. :—The plaint was originally filed against the infant sons of the present defendants under the erroneous supposition that those minors were the representatives of the alleged debtor, Sorábjí, then deceased, and were so constituted by his will, dated 22nd January, 1867. They were, however, only legatees under that will, of which two other persons (not the present defendants) were appointed executors. By a subsequent will, dated 13th November 1867, which had the effect of revoking the previous will, Sorábjí constituted the present defendants "his two heirs after his decease," of which will probate was granted to the defendant, Bápuji, after the date of the filing of the plaint. The cause of action is laid as having accrued on the 9th December 1866. The plaintiff, on the 22nd February 1870, applied to have the present defendants (who, in the title of the plaint, as originally filed, were described as guardians of the minors) substituted as defendants in lieu of their infant sons. This substitution was made on the 4th April 1870. Under these circumstances, the present defendants say that they ought not to have been made defendants by substitution, and that even if it were right so to make them and not to put the plaintiff to file a new suit against them, yet the suit is barred by Act XIV. of 1859, as it cannot be regarded

as instituted against them until the 4th April 1870, or at the soonest, the 22nd February 1870, and they rely on *Kaj Kishoree Dossee v. Budden Chunder Shaha* (b), and *Chunder Madhub Chuckerbutty v. Bissessuree Debea* (c).

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The plaintiff, on the other hand, relies on *Mohan Chand Mohun v. Azcem* (d), *Kandu v. Azim Kazi Chowkidar* (e), and on Section 14, Act XIV. of 1859. We, however, think that this case neither falls within the authority of the case last cited nor within the 14th Section of Act XIV. of 1859. The suit was originally brought against the infants, the present defendants being only named as guardians, and, therefore, cannot be considered as a suit brought against the same defendants, and it is not a suit brought against some person whom the present defendants now represent, but against some persons (viz., the minors), whom the present defendants were formerly erroneously supposed by the plaintiff to have represented, and, moreover, against persons who did not in fact represent the deceased debtor Sorâbji. Under these circumstances we think that were we to apply Sec. 14 to the present case for the benefit of the plaintiff, we should be adding words to that section not now to be found in it. On this ground, we hold that this suit cannot be maintained against the present defendants, and it is unnecessary for us to enter upon the question of *bona fides* and due diligence, which might arise hereunder the same section, if the suit were to be considered as originally instituted against persons whom the defendants represent. We dismiss the appeal with costs. Only one set of costs, however, is to be allowed to the defendants, as they ought to have appeared and defended the appeal jointly and not separately.

Decree affirmed.

(b) 6 Calc. W. R. Civ. R. 298.

(c) Ibid 184.

(d) 12 Ibid 45.

(e) Beng. L. Rep. A, C, J. 233.

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February 19.

[APPELLATE CIVIL JURISDICTION.]

S. R. & B. v. 64-98.

Special Appeal No. 218 of 1870.

SHIDHOJIRA'V *Appellant.*

NA'IKOJIRA'V *Respondent.*

Attachment—Limitation—Act XIV. of 1859, Sec. 1, cl. 13—Exclusive possession.

Suits to enforce the right to share in any property, on the ground that it is joint family property, must be brought within twelve years, exclusive of the period during which the property was under attachment by Government and neither party was in possession.

A custom of primogeniture in the family of a *Desai* in the Southern Maratha country supersedes, if clearly proved, the general Hindu Law of descent.

Case of *Subbaiya v. Rajesvara* (4 Mad. H. C. Rep. 354) followed.

THIS was a special appeal from the decision of C. H. F. Shaw, District Judge of Belgaum, in Appeal No. 85 of 1869, confirming the decree of the Principal Sadr Amin of Dharwar.

The suit was instituted by Shidhojiráv for a partition of, and a half share in, the entire family property, moveable and immoveable, in the possession of Náikojirá v. Shidhoji alleged in the plaint that his great-grandfather, Narsojiráv, and the defendant's grandfather, Singájiráv, were brothers; that the property was joint property till 1853, when the defendant ousted him (plaintiff) in execution of a decree, obtained by the defendant in that year against the plaintiff's father. The defence chiefly was that the claim was barred by the law of limitation and that the family was divided. The Court of first instance threw out the claim, as barred by limitation.

In appeal, the District Judge raised the issues: (1) whether the custom of the family of the *Adkar Desais* supersedes the Hindu law of partition of the *Watán* and permits only

maintenance to cadets, and if so, whether this custom is good ; (2). Whether the claim is barred by Act XIV. of 1859.

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The Judge found that, in the family of the *Desáís*, a custom existed which did not admit of partition of the family property, but only allowed maintenance to younger members. He, however, held that the custom was not to prevail against the law of the land. He also held the claim to be barred under Act XIV. of 1859, Sec. 1, Cl. 13.

The special appeal was argued before SARGENT, Acting C.J., and MELVILL, J.

Leith (with him *Shántarám Náráyan*) for the appellant.

The Hon. A. R. Scoble (Adv. Gen.) (with him *Bhairavnáth Mangesh*) for the respondent.

SARGENT, C.J. :—The first question in this case is whether the suit is barred by the Act of Limitation. The claim is for a share of a *watan* alleged to be joint family property. That such is its character is not denied by the defendant, and the question must, therefore, be determined by the application of Cl. 13 of Sec. 1 of Act. XIV. of 1859.

The true construction of that section is, we think, in the main, correctly expressed by the High Court of Madras in the case of *Subbaiya v. Rajesvara* (a). "What is necessary," they say, "to constitute the bar is proof of possession and enjoyment of the property, as the possessor's own separate property, to the absolute exclusion of the person suing to enforce the right to share, for twelve years computed from either of the events mentioned in the clause, so as to rebut the presumption of constructive joint-possession arising out of the relation of co-parceners." Or to adapt the rule to the more general case, there must be possession and enjoyment by some one or more of the other members of the family, or by some one managing on behalf of the family, without participation by the plaintiff, or persons through whom he

(a) 4 Mad. H. C. Rep. 357.

1873. SHIDHOJIRA'V claims in the usufruct of the property. Now, assuming that
 v. the first clause of the section, which makes the time run
 NA'IKOJIRA'V. from the death of the persons from whom the plaintiff claims,
 is applicable to a family governed by Mitákshará law, there
 is no evidence in the present case of exclusive enjoyment by
 the plaintiff's branch of the family previous to the death of
 Appáji, although there may be of possession and manage-
 ment. Nor can the Judge, we think, be understood as
 meaning more than this when he says: "There can, however,
 be no doubt but that Appá was the acknowledged proprietor
 at the time of his death in 1844, and that Amrut was merely
 his manager," for he goes on to say: "The judgment of the
 District Court at Dharwar merely had the effect of declaring
 the *statu quo* of parties; and if Shidhoji and his mother had
 acted wisely, proceedings should at once have been commenced
 to effect partition."

As to what occurred after the death of Appá, the late *Desái* .
 of Adkur, it is admitted that Amrut, the plaintiff's father, had
 exclusive enjoyment until 1845 when the property was at-
 tached by the Assistant Political Agent at the instance of
 the defendant's mother. Between that time and 1853, when
 Náikoji was put into possession, neither party enjoyed the
 estate, and it was not until the last-mentioned year that
 the defendant acquired exclusive possession and enjoyment.
 As the plaint was filed on the 29th March 1864, twelve years
 had not elapsed since then before the present suit was insti-
 tuted. It was, however, urged that the Political Agent must
 be deemed to have been in possession on account of the defen-
 dant, who ultimately succeeded in the suit instituted by him
 in 1847. But a constructive possession of that nature, by
 making the decree in that suit relate back to the date of
 the attachment, is, in our opinion, inadmissible in a question
 under the Act of Limitation. The question is what was
 the actual state of things during the period in question; and
 neither of the members of the family during that time was
 either in possession or enjoyment of the *watan*. We think,

therefore, that the Court below was wrong in holding that the suit was barred ; and it becomes necessary to consider whether effect can be given to the family custom, which the Court has found to be proved, namely, that cadets should receive maintenance and not partition.

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By Sec. 21 of the Amended Letters Patent of 1865, the High Court, in its appellate jurisdiction, is directed to administer the same law, equity, and rule of good conscience, as the Court, in which the proceedings in the case were originally instituted, ought to have applied.

That law, by Sec. 26 of Regulation IV. of 1827, is to be the "usage of the country" in which the suit arose; and if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity, and good conscience alone. The expression "usage of the country" is sufficiently general to allow either of a very large or restricted application. In the case of *Basvantrá v. Kedingáppá v. Mantáppá Kedingáppá* (b), the defendants pleaded a custom, for many generations in the family, by which the younger members received only a grant of land for their maintenance, and had no right to enforce partition of the *watan*; and the Court, whilst doubting whether the custom was sufficiently proved, refused in any case to give effect to it, saying "that it would be a dangerous doctrine that any petty family (and in the case under consideration a third of the family property is valued for the purposes of the suit at little more than Rs. 500) is at liberty to make a law for itself, and thus to set aside the general law of the country."

It is to be remarked that in the case cited, the family did not belong to any particular class or section of the community, and that the custom set up was that of a single family. In the present case, the family are *Desáís*, and belong to a class who, at one time, at least, occupied an important position in this Presidency; and further, the alleged custom would appear,

(b) 1 Bom. H. C. Rep. Appx. 42, 2nd Ed.

1873. from Steele's work on the Laws and Customs of Hinodo Castes
 SHIDHOJIRAV in the Dekkan Provinces, to be in accordance with a very
 v.
 NAIKOJIRAV. general usage of that class of hereditary officers. At page
 229 he says : "Among Desmookhee Wuttundars, in some
 places, the eldest takes the whole property, giving, to his
 brothers and relations, villages, shares of villages, haks or
 nemnooks, for their subsistence. In others, the eldest reserves
 to himself a larger share, with the privileges of Burepuna and
 Karbharee or management, giving the rest a smaller share each.
 In others, the eldest merely takes the management and Bure-
 puna privileges, all sharing the property equally." He
 then deals with the cases of Deshpandey, Patells, and Kool-
 karnies, showing that the practice, in some shape or other, of
 providing for the support of the entire family, without actual
 partition, is very general amongst all the district and village
 hereditary officers. Sir H. Maine, in his Ancient Law at p.
 234, points out how the general law of equal distribution of
 property yields to the exigencies of the case, when the property
 is associated with an hereditary public office. He says : "All
 offices, in India, tend to become hereditary, and, when their
 nature permits it, to rest in the eldest member of the eldest
 stock." These special circumstances distinguish the present
 one from the one cited, as also from the case reported in 6
 Mad. H. C. Rep. 93, where the Court held that a single
 family could not set up a particular custom in derogation of
 the general law. The Court, after summarising the con-
 flicting views of Jurists on the subject of customary law, say :
 "That the authors, who deal with this subject, are all discuss-
 ing customary law as applicable to a whole community or a
 large section of it. They would never have conceived it
 possible for a customary law antagonistic to the general law
 to be established by evidence of the acts of a single family
 confessedly subject to that general law." It is difficult to
 reconcile this ruling with the remarks of the Privy Council
 in *Soorendronath Roy v. Mussamut Heeramonee* (c). There
 the question was whether a single family, which had come

into Bengal from a distant part of India, had retained, as a family usage, the law of descent peculiar to that part, and the Privy Council held that the evidence established they had done so, and made use of that conclusion in deciding as to the *factum* of a disputed will. Their Lordships say: "The prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place, of the property of people of that class or race, stands on the footing of usage or custom of the family;" and "whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both."

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To the same effect are the remarks of the Privy Council reported in the case of *Serumah v. Palathun* (d) where their Lordships recognize the possibility of a family custom being proved, adding that it should be distinctly proved.

In the present case, however, the alleged custom, for the reasons we have before given, cannot be regarded as the usage of a single family. To summarize what has been said, we find a general usage, amongst a large and important class of the community, of dispensing with actual partition, and providing for the maintenance of the family by special arrangements varying in different families, the general character of which, however, is the vesting of the family property principally in the representative of the elder branch, subject to the support of the other members; and the custom now pleaded is one of the forms which the general usage assumes in numerous instances. We think, therefore, that we shall best give effect to the spirit of the Regulation, as well as to the tenor of the decisions of the Privy Council, by holding that an alleged custom, by which the property of a family, circumstanced as this is, is vested in the representative of the eldest branch, charged with the maintenance of the other members, is one which, if clearly proved, should be

(d) 15 Calc. W. Rep. P. C. 47.

1873. allowed to displace the plaintiff's right to partition under the
SHIDHOJIRA'V general law.

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The Judge has found the custom proved without giving any reasons for his decision as he was bound to do, if, indeed, he intended to do more than express an opinion, having already made up his mind that the suit was barred. We cannot, therefore, accept his finding, the more particularly on a question requiring much careful examination of the evidence, and must remand the case for retrial on the merits; and, in doing so, we think it right to draw his attention to a very clear statement of the sort of proof, which is required by law to establish a legal custom, in the judgment of the Madras Court, *Sivananja v. Muttu* (e): "It must be satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the family, class, or district of country; and the course of practice, upon which the custom rests, must not be left in doubt, but be proved with certainty."

In case the Judge should find the custom proved, he should proceed to determine what provision should be made for the plaintiff. Although maintenance forms no part of his claim, we think that, in analogy to the practice, adopted by this Court in numerous cases, where a widow has sued or been sued for property and failed, of awarding maintenance where it was clear she was entitled to it: *Rázábái v. Sadu* (f), *Rakhmábái v. Rádhábái* (g), this may properly be done in the present suit, to avoid unnecessary litigation. We, therefore, reverse the decree of the Court below and remand the case for retrial on the merits having regard to the above remarks.

Costs of appeal to abide the result as to proof of custom.

(e) 3 Mad. H. C. Rep. 77.

(f) 8 Bom. H. C. Rep. A. C. J. 99. (g) 5 Ibid. 193.

[APPELLATE CIVIL JURISDICTION.]

1873.
April 2.*Regular Appeal No. 57 of 1870.*THE COLLECTOR OF SURAT *Appellant.*DHIRSINGJI VAGHBA'JI *Respondent.**Adoption—Gift and acceptance—Giving in adoption by paternal grand-father—Decree—Evidence.*

To constitute a valid adoption, there must be a gift and acceptance.

When the natural father is dead, and the mother is living, she is the only person who can give in adoption. The Hindu law does not authorize the paternal grand-father or any other person to give in adoption in such a case.

THIS was a regular appeal from the decision of W. H. Newnham, Acting District Judge of Surat.

Dhirsingji brought this suit to establish his right to a *Tordá Girás hak*, and alleged that he was adopted by Devbái, widow of Vaghbáji. The suit was at first rejected by the Judge on the ground that the claim was illegal and that Government was not bound to pay it. On appeal, the High Court reversed that decision, and remanded the case for retrial on the merits.

The Judge then made a decree in favour of the plaintiff, holding him to be the duly adopted son of Devbái Kom Vaghbáji. The following is an extract from his judgment:—

“Is the plaintiff the duly adopted son of Devbái Kom Vaghbáji? I find that in 1851* it was decided by the Senior Assistant Judge of Broach that he was so. This decision is not shown to have been subsequently reversed; and, although Government was no party to it, I hold that, as regards the mere fact of adoption, (not as to the question whether Government is bound to recognize the adoption, as governing the succession to the *hak*,) this, as a judgment of status, is conclusive. I find farther that the defendant's *rakil* declined to call any evidence to rebut the alleged adoption on the ground

* This date is erroneous. The decree was made in 1852 in a suit commenced in 1851.—ED.

1873. that the late Judge ' had held the adoption proved ' *
 THE * * ; but in order to leave no room for objection,
 COLLECTOR I allow the defendant's *vakil* to point out any evidence he has
 OF SURAT. in disproof of the adoption. He shows that, on several oc-
 V, casions afterwards, the plaintiff's name was signed with the
 DHIRISINGJI addition of that of his natural, and not his adoptive, father ;
 VAGHBHAJI. and that he sometimes described himself as the *heir* and not
 as the son of Devbái ; but I find that on other occasions he
 called himself by the adoptive father's name, and no stress
 can be laid on this objection. Defendant's *vakil* further
 urges that, as an only son, he could not be lawfully adopted ;
 but there is the case of *Chinna v. Kumára* (x), on the very
 passage of Strange, which he quotes, that such adoption is
 valid when made. I find for the plaintiff on this issue."

In the memorandum of appeal, these two objections *inter alia* were taken to the decisions of the District Judge:—The Judge was wrong in receiving the Decree No. 30 in evidence against the defendant who was not a party to it. The alleged adoption is invalid according to the Hindu law and the usage of the country.

The appeal was argued before WESTROPP, C.J. and MELVILL J. Mayhew, Legal Remembrancer, (with him *Dhirajlál Mathurádás*, Government Pleader,) for the appellant, cited Strange's Manual of H. L. 21; 1 Strange H. L. 81; Macnaghten's H. L. 66; Grady's H. L. 36, 46; 1 Norton's Leading Cases, 57; Stoke's H. L. Bks. Pl. 7, 8, 9.

Anstey (with him *Nánábhái Haridás*) for the respondent :—Reputation of adoption should be regarded as strong proof of adoption. There was a decree in 1852 establishing the adoption. The father being dead, the grandfather was competent to give. If the term ' son ' include, as it does, a grand-son, *e converso* a ' father ' includes a grandfather. There is no evidence that the natural mother ever dissented from the gift.

WESTROPP, C.J. :—It is clear Hindu law that to constitute a valid adoption, there must be a gift and acceptance—1 Stra. H. L. 95 ; Manu ch. IX. pl. 168 ; Mitak. ch. I. Sec. 11, pl. 1.

At the time of the alleged adoption the natural father of the plaintiff was dead—his mother was living and his paternal grandfather. The mother was not present at the ceremony, and there is not any evidence of her having assented to the adoption. There is some but not very strong evidence that the plaintiff was given in adoption by his paternal grandfather. A deed of adoption purporting to be executed by Devbái, the adopted mother, has been produced, but can scarcely be said to have been proved. To that deed the plaintiff's paternal grandfather does not appear to have been either a party or even an attesting witness. No evidence, however, has been given to contradict the faint evidence of the paternal grandfather having given the plaintiff in adoption. Assuming then that he did so give him, there remains the question whether such a giving in adoption by the paternal natural grandfather, to which the natural mother has not been shown to have been in anywise a party, can be regarded as a valid gift. The Hindu law clearly points to the mother as the person who can give in adoption when the natural father is dead (a). There has not been any authority quoted to us, nor do we know of any, which would authorize the paternal grandfather or any other person to give in adoption after the death of the natural father except the mother ; and so far as the authorities on the subject go, they are against the proposition that the paternal grandfather could give in adoption. It has been held in Madras by Phillips and Holleway, J.J., *Subbáluvammál v. Ammákutti* (b), and also in Bombay by Sir R. Couch, C.J., *Balvantráv v. Bayábái* (c), that an orphan cannot be adopted, and this is because there cannot be any lawful giving of him in adoption in such a case. It does not appear whether or not the paternal grandfather

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(a) Manu ch. IX. pl. 168 ; Miták. ch. 1, Sec. 11, pl. 1, 9 ; Vyav. Mayukha ch. 4., Sec. 1., pl. 1. 16 *et seq* ; Datt. Chand. Sec. I., pl. 12, 31.

(b) 2 Mad. H. C. Rep. 129. (c) 6 Bom. H. C. Rep. A. C. J. 83, 85.

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of the orphan was in either of those cases living or had assented to the adoption. It is sufficient for us to say that inasmuch as the Hindu law plainly indicates the mother as the person authorized to give in adoption where the father is dead, and is silent as to any other person having, under such circumstances, authority to give in adoption so long as she lives, we feel bound to hold that a giving in adoption by the paternal grandfather, when the plaintiff's natural mother is living, cannot be supported. In the present case it is, we think, quite established by the evidence of the plaintiff's own witnesses that his natural mother was not present at the ceremony of adoption, and was not even resident at the place where it was performed, and did not take any part whatever in it.

We do not consider that the decree in the former suit, to which the Collector was not a party, was admissible in evidence in this case: *Kanhya v. Radha Churn(d)*. It is unnecessary for us to enter upon the other points in this case. We reverse the decree of the District Judge, and make a decree for the defendant, the Collector of Surat, with costs of the suit and appeal.

In the above case, a petition of review was presented on behalf of the respondent, Dhirsingji by Mr. Shántarám, Náráyan. The case was argued *ex-parte* before WESTROPP, C.J., and MELVILL, J., on the 2nd October 1873, when the following judgment was given by—

WESTROPP, C.J. :—This Court is now asked to review its decree of the 2nd April 1873, on the ground that the point on which that decree was rested—the invalidity of a giving in adoption of the plaintiff by his paternal grandfather while the plaintiff's natural mother was living, there not being any evidence of her being a party to that act—came upon the plaintiff by surprise, and that, if he had been prepared for it, he would have adduced evidence to show her assent to or ratification of the act of the paternal grandfather.

No such surprise was alleged on the 2nd of April 1873, when the cause was being argued before this Court—and we do not perceive how such an assertion, if made, could have been then sustained. The 2nd issue, settled by Mr. Kemball as District Judge of Surat (see his decree of the 17th June 1867), was:—"Whether the plaintiff was the duly adopted son of Devbái, wife of Vaghbáji." On the trial (on remand of this cause) by Mr. Kemball's successor, Mr. Newnham, on the 2nd of September 1870, the same issue was before him, and he, upon no other evidence than the decree of the Assistant Judge of Broach, made in 1852 in the suit of 1851, came to a finding upon that issue in the affirmative. When this cause came, upon the 26th of June 1872, before the High Court (LLOYD and MELVILL, JJ., presiding), it, on the authority of the Full Bench decision at Calcutta, *Kánhya v. Radha Churn* (*supra*), held the decree of 1851 not to bind the Collector, inasmuch as neither he, nor Government, was a party to the suit in which that decree was made—but, thinking it probable that the plaintiff might have been induced not to give in the District Court other proof of adoption than the decree of 1852 in the suit of 1851, on the supposition that it would be sufficient to establish that fact, this Court, then exercising its power under Sec. 356 of the Civil Procedure Code, directed the District Judge to take such evidence on the point of adoption as might be offered by either of the parties, and to forward it to this Court. The District Judge did so. It is manifest that, on behalf of the defendant (the Collector), the witnesses produced by the plaintiff were cross-examined to show that Dhirsingji's natural father was dead at the time of the alleged adoption by Devbái, and that the plaintiff's natural mother was not present at the adoption. (See the evidence of the witnesses Nos. 20, 21, 22, and 23 examined before Mr. Newnham, and the witnesses Nos. 7 and 8 examined under commission from him at Baroda.) If the defendant or his pleader had not intended to dispute the validity of a giving in adoption by the natural grandfather,

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VAGHBA'JI.** Sardár Bawa (mentioned in the decree of the Assistant Judge of Broach of the 27th September 1852, and of which some evidence was given in the present suit in Exhibits 7 and 8 already mentioned), it would have been quite unnecessary to cross-examine the plaintiff's witnesses as to the presence of his natural mother at the adoption. The plaintiff must have been made aware from the defendant's written statement filed on the 24th August 1866, that the defendant disputed the validity of his adoption, and continued to do so in the appeal to this Court; and, ever since the order of this Court on the 26th June 1872, the plaintiff must have been aware that the decree of 1852 in the suit of 1851 would not suffice to establish his adoption in this suit, and that it would be necessary for him to give full and independent proof of such a giving and receiving in adoption as is required by Hindu Law. The order, then made, was an ample warning to him, and the subsequent cross-examination of his witnesses clearly showed the direction which the objection to the giving in adoption would take. It is, under these circumstances, impossible to hold that he has been, in any respect, surprised by the course which the case took when it came before this Court on the 2nd April 1873 (Westropp C.J., and Melvill, J., presiding), and this Court accordingly sees no ground for granting a review of that decree.

[APPELLATE CIVIL JURISDICTION.]

1873.
October 51.*Regular Appeal No. 11 of 1870.*

BHAGVA'NDA'S TEJMAL Appellant. *MR 2 Comp 89.*
 RA'JMAL alias HIRA'LA'L LACHIMANDA'S. Respondent. *MR 2 Comp 89.*

Hindu Law—Adoption among the Jains—Custom—Usage.

A. B., a member of the community of *Jainas* of Márvádi origin, who form part of the inhabitants of Ahmadnagar in the Deccan, died without leaving natural born issue and without adopting any child. His wife, who survived him, resolved, shortly before her death, on adopting the son of C. D., a brother of A. B., but did not live to carry her intention into effect. After her death, C. D. and E. F., (another brother of A. B.) with the assent of the Pānch or senior members of their community, went through a ceremony of giving the boy in adoption to the deceased A. B. and his deceased wife, and an instrument of agreement wholly founded upon that adoption, was executed by E. F. to C. D., and affected to deal with the property moveable and immoveable of A. B.

Held that the adoption was invalid and that the instrument of agreement fell together with it.

Quære whether such an instrument, being unregistered, and dealing with immoveable property above the value of Rs. 100, was not, upon that ground alone, invalid.

Adoption among *Jainas* is, in the Presidency of Bombay, regulated by the ordinary Hindu law, as is their succession to property generally, notwithstanding their divergence from Hindus in matters of religion; and Hindu law does not allow any one but the widow to act vicariously for the man to whom the son is to be affiliated; the widow is a delegate either with express or implied authority, and cannot extend that authority to another person, so as to enable him to adopt a son to her husband after her decease; not only a giving but an acceptance by the man, or his wife, or widow, manifested by some overt act, being necessary to constitute an adoption by Hindu law.

When amongst Hindus (and *Jainas* are Hindu dissenters) some custom different from the normal Hindu Law and usage of the country in which the property is located, and the parties resident, is alleged to exist, the burden of establishing its antiquity and invariability is placed on the party averring its existence, and it should be proved by clear and unambiguous evidence above suspicion.

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THIS was an appeal from the decision of Krishnáji Víshnu, First Class Subordinate Judge of Ahmadnagar, in Original Suit No. 255 of 1869, and was argued on the 16th of July 1873 before WESTROPP, C.J., and NANABHAI HARIDAS, J. The facts are sufficiently stated in the judgment.

Branson and Shivshankar for the appellant :—The alleged custom is not judicially recognized. No instance of it of more than 22 years' standing has been proved. Only four instances have been attempted to be proved. This is not sufficient : *Táyumána v. Perumál* (x), *Narasammál v. Balarámácharlu* (a), *Kojahs and Memons' Case* (b), *Tara Chand v. Reeb Ram* (c), *Málharáv Ráchavendra v. Bálkrisna* (d), Reg. IV. of 1827, Sec. 26 ; *Lalla Mohabeer v. Mussamat Kundun* (e). *Jainas* are subject to Hindu law.

Special Appeal No. 645 of 1866 as to adoption (ee). This adoption was invalid by Hindu law, the adoptive father and mother being both dead at the time of the ceremony.

Bhairavnáth Mangesh, contra :—Though *Jainas* do not perform the *Sráddha* ceremony, they adopt to perpetuate their names. The taking in adoption may be performed vicariously : See Mr. Ellis's opinion in 2 Stra. H. L. 93, 94. The appellant is estopped from disputing the adoption by Exhibit No. 36 : *Singamma v. Ramanuja Charlu* (f), *Rupchand Hindúmul v. Rakhmábái* (g). Though Exhibit No. 36 is unregistered, it is admissible to prove the adoption : *Lachmiput Sing Dugar v. Mirza Khairat Ali* (h.)

It does not need a stamp : *Ráje V. A. Nimbálkar v. Jayavantráv M. Ranadive* (i), *Sangáppá Ningáppá v. Basáppá Paráppá* (j). It is sufficiently stamped. Special Appeal No. 218 of 1870 as to custom.

(x) 1 Mad. H. C. Rep. 51 (a) Ibid. 420, 425.

(b) Perry's Or. Ca. 110 *et seq.*

(c) 3 Mad. H. C. Rep. 50. (d) 4 Bom. H. C. Rep. A.C.J. 113,

(ee) See note (d) at the end of this case.

(e) 8 Calc. W. Rep. Civ. R. 116. (f) 1 Norton, L. C., 73, 87.

(g) 8 Bom. H. C. Rep. A.C.J., 114.

(h) 12 Calc. W. Rep., F. B. 11. S. C. 4 Beng. L. R., 18 F. B.

(i) 4 Bom H. C. Rep., A. C. J., 191. (j) 7 Ibid. 2.

Branson in reply:—Supposing Exhibit No. 36 to be admissible to prove the adoption, it only proves an invalid adoption. It deals, too, with immoveables of higher value than Rs. 100, and therefore is not admissible and is invalid, not being registered.

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Cur. adv. vult.

WESTROPP, C.J.:—This suit was instituted by the plaintiff, Rájmal, against his natural father Ganeshdás, and uncle Bhagvándás, the present appellant. These parties are Márvádís professing the *Jaina* religion and are resident at Ahmadnagar.

Tejmal had three sons, who survived him—of these Lachimandás was the eldest. He died in 1867, without issue, but leaving a widow, Hirábái, who survived him and died in September 1868. The two other sons of Tejmal were the defendants, Ganeshdás and Bhagvándás.

Lachimandás seems to have had some intention of adopting a son, but died without carrying it into effect.

Hirábái, his widow, was, for some time previously to her death, desirous of adopting a son on behalf of her deceased husband. Having made one or two unsuccessful efforts to obtain such a son, she seems, when in her last illness, to have resolved on adopting her husband's nephew, the plaintiff Rájmal, the eldest son of the defendant Ganeshdás, who agreed to give Rájmal to her, but she died without effecting her purpose.

A funeral feast (Diwas), of two days' duration, was given by Ganeshdás and Bhagvándás in honor of Hirábái to the caste about a fortnight after her death, on the second day of which feast, Ganeshdás, Bhagvándás and two other persons appear to have given, with certain ceremonies, the plaintiff Rájmal (then an adult) as adopted son to his deceased uncle Lachimandás and aunt Hirábái.

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On the same day, the following document (Exhibit No. 36) dated Shake 1790, Ashvin Shudhya 9th, or 25th September 1868, was executed by Bhagvándás.

"From Bhagvándás Tejmal Márvádi, resident of Ahmadnagar.

To Chiranjiv Rájeshri Rájmal *alias* Hirálál valad Lachimandás Bohuru Márvádi, resident of Ahmadnagar.

1. The reason of this acknowledgment in writing is that my elder brother named Lachimandás Tejmal lived and died at Ahmadnagar. His wife Hirábái survived him, but died subsequently on Bhádrapad Vadya 8th, Shake 1790. She, the widow Hirábái, when on the point of her death, had desired to take a son in adoption, but there was hardly time to do this at the time of her demise.

2. I, Bhagvándás, and Ganeshdás Tejmal are the legal heirs of the deceased Lachimandás Tejmal and of his widow, Hirábái. In compliance with the dying request of the widow Hirábái, the 'Panch', that is, the members of our caste, have met and resolved to perpetuate the name of the deceased Lachimandás.

3. Hence, agreeably to the resolution of the 'Panch,' it is settled that the *khan* of the shop, situated in Surjikha market at Ahmadnagar, belonging to the share of the deceased Lachimandás, is given with its upper story to Ganeshdás in exchange for the middle *khan* belonging to the share of Ganeshdás which is made over to me. That the property in the house of Lachimandás, the deceased, consisting of gold and silver, cloth, utensils of brass, copper, &c., and iron, &c., be given to us, that is (to Ganeshdas and Bhagvándás).

4. And all the rest of the property of the deceased Lachimandás and Hirábái, consisting of debts, bonds, documents, whether within or without the city of Ahmadnagar, such as Jecoor, Muthpimpree, and other villages, standing in the name of the deceased Lachimandás and Hirábái, are given to you (Rájmal), who are hereby constituted as the

proprietor thereof. I, Bhagvándás, forego all claim to the property mentioned in this 4th paragraph, and you (Rajmál) have no claim to the property mentioned in the above 3rd paragraph.

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5. In pursuance of the opinion of 'the Panch', and in accordance with the desire of the deceased Hirábái, you are given in adoption to the deceased Lachimandás to perpetuate his name. You shall therefore conduct yourself accordingly and manage your affairs.

6. That the house in the city of Ahmadnagar, called Kirpes Vádá, is made over to you by me, Ghaneshdás, and the 'Panch.' You make use of it as your own property. The deceased Lachimandás has left me and Ganeshdás as his heirs. I have therefore applied to the District Judge for a certificate of heirship. Now that you are given in adoption to perpetuate his (the deceased Lachimandás's) name, I, in consequence, cancel my above application previously made for a certificate of the deceased's (Hirábái's) heirship. You should now make an application in your name for a certificate. To this I have no objection whatsoever. This acknowledgment is given in writing by me.

(Signed) Bhagvándás Tejmal Bohuru Márvádí,
Resident of Ahmadnagar.

I agree to what is written above.

Signed by seven witnesses in their own handwriting.

Signed by the writer Náro Narhar Deshmukh and Deshpánde Kulkarni of the Ahmadnagar Havelli."

That document bore an eight rupee stamp, but was not registered.

The present suit was brought by Rájmal to establish his sole right to the property, moveable and immoveable, of Lachimandás and Hirábái as their adopted son. The plaint stated that the District Judge, notwithstanding the adoption, had granted (under Bombay Regulation VIII. of 1827, Secs.

1873. 2 and 3) to the defendants, Ganeshdás and Bhagvándás, a certificate of their heirship to Lachimandás. The plaintiff also alleged and relied upon a custom of the *Jaina* Márvádi caste, as well in Marwar, as in Ahmadnagar, of adoption in cases where both the adoptive father and his wife have died before the adoption took place.

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The defendant, Ganeshdás, the natural father of the plaintiff, in his written statement admitted the giving in adoption by himself and Bhagvándás in accordance with the desire of Hirábái, and stated that 4,000 rupees' worth of jewels and ornaments belonging to Lachimandás and Hirábái had been equally divided between himself and Bhagvándás, and that, if the latter would return his moiety to the plaintiff, he (Ganeshdás) would return his moiety also, and said that he offered no obstruction to the plaintiff's claim.

Bhagvándás, in his written statement, said that by Hindu law the adoption was invalid, Lachimandás and Hirábái having both died before the ceremony took place, and he alleged that he and Ganeshdás were the heirs of Lachimandás, and had accordingly, as such, obtained the certificate of heirship already mentioned. He admitted the division of the 4,000 rupees' worth of jewels and ornaments between himself and Ganeshdás, and he objected to Exhibit 36 as being insufficiently stamped and unregistered.

The Subordinate Judge held the custom and the fact of the adoption to be proved, and the Exhibit No. 36 to be sufficiently stamped,* and not to require registration. Accordingly, he made his decree in favour of the plaintiff with costs against Bhagvándás.

The defendant Bhagvándás has preferred a regular appeal against that decision to this Court. There are twenty-two points contained in the memorandum of appeal. The points, as argued before us, were, however, substantially as follows :—

(*) Vide 4 Bom. H. C. Rep. 191. Ed.

1. That the alleged custom was not satisfactorily proved, and had never been judicially recognized.

2. That it was invalid, and contrary to the Hindu Law which governed the case.

3. That Exhibit 36, being unstamped and unregistered, was improperly admitted in evidence for any purpose.

4. That, even if properly in evidence, it was executed without consideration and did not bind the defendant, Bhagvándás.

5. That it had never been, and was not intended to be, carried into effect by any of the parties to it.

Mr. Mountstuart Elphinstone, after describing the Brahmanical and prevailing religion of Hindustan, the worship of the Triad—Brahma, Vishnu and Siva—and the minor Hindu deities (*a*), says: "There are two other religions, which, although distinct from that of the Hindus, appear to belong to the same stock, and which seem to have shared with it in the veneration of the people of India before the introduction of an entirely foreign faith by the Mohamedans. These are the religions of the Baudhas (or worshippers of Budha) and the Jains. They both resemble the Brahman doctrines in their character of quietism, in their tenderness of animal life, and in the belief of repeated transmigrations of various hells for the purification of the wicked, and heavens for the solace of the good. The great object of all three is the ultimate attainment of a state of perfect apathy, which, in our eyes, seems little different from annihilation; and the means, employed in all, are the practice of mortification and of abstraction from the cares and feelings of humanity. The differences from the Hindu belief are no less striking than the points of resemblance, and are most so in the religion of the Baudhas" (*b*). After describing that religion, he proceeds to say of the *Jainas*: "The Jains hold an intermediate place between the followers of Budha and Brahma. They agree with the Baudhas in denying the

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(*a*) Chapter IV. History of India, 4th Ed., pp. 85-103. (*b*) Ibid 103.

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existence, or, at least, the activity and providence of God ; in believing the eternity of matter ; in the worship of deified saints ; in their scrupulous care of animal life, and all the precautions, which it leads to ; in their having no hereditary priesthood ; in disclaiming the divine authority of the Vedas ; and *in having no sacrifices and no respect for fire*. They agree with the Baudhas also in considering a state of passive abstraction as supreme felicity and in all the doctrines which they hold in common with the Hindus. They agree with the Hindus in other points, such as division of caste. This exists in full force in the south and west of India, and can only be said to be dormant in the north-east ; for, though the Jains there do not acknowledge the four classes of the Hindus, yet a Jain converted to the Hindu religion takes his place in one of the castes ; from which he must all along have retained the proofs of his descent ; and the Jains themselves have numerous divisions of their own, the members of which are as strict in avoiding intermarriages and other intercourse as the four classes of the Hindus. Though they reject the scriptural character of the Vedas, they allow them great authority in all points not at variance with their religion. The principal objections to them are drawn from the bloody sacrifices which they enjoin, and the loss of animal life which burnt offerings are liable (though undesignedly) to occasion. They admit the whole of the Hindu gods and worship them, though they consider them as entirely subordinate to their own saints, who are therefore the proper objects of adoration. Besides these points common to the Brahmans or Baudhas, they hold some opinions peculiar to themselves. The chief objects of their worship are a limited number of saints, who have raised themselves by austerities to a superiority over the gods, and who exactly resemble those of Baudha in appearance and general character, but are entirely distinct from them in their names and individual histories. They are called Tirtankeras ; there are twenty-four for the present age, but twenty-four also for the past, and twenty-four for the future. Those most worshipped are in some places Riskoba ;

the first of the present Tirtankeras, but everywhere Paras-
 nath (c) and Mahavira [sometimes called Vardhaman (d) or
 Sramana] the twenty-third and twenty-fourth of the number.
 As all but the two last bear a fabulous character in their di-
 mensions and length of life, it has been conjectured, with
 great appearance of truth, that these two are the real found-
 ers of the religion. All remain alike in the usual state of
 apathetic beatitude, and take no share in the Government of
 the world. Some changes are made by the *Jainas* in the rank
 and circumstances of the Hindu gods. They give no pre-
 ference to the greater gods of the Hindus; and they have
 increased the number of gods, and added to the absurdities
 of the system: thus they have sixty-four Indras, and twenty-
 two Devis. They have no veneration for relics and no monas-
 tic establishments. Their priests are called *Jatis* (Yatis);
 they are of all castes, and their dress, though distinguish-
 able from that of the Brahmans, bears some resemblance to
 it," &c., &c. (e). At page 112, Mr. Elphinstone says:
 "The *Jainas* appear to have originated in the sixth, or
 seventh, century of our era; to have become conspicuous in
 the eighth or ninth century; got to the highest prosperity in
 the eleventh, and declined after the twelfth. Their princi-
 pal seats seem to have been in the Southern parts of the
 Peninsula, and in Gujerat and the West of Hindustan." [*Ex.*
Gr. Mewar and Marwar, apparently the cradle of the sect (f)].
 "They seem never to have had much success in the provinces
 on the Ganges. They appear to have undergone several per-
 secutions by the Brahmans, in the South of India at least.
 The *Jains* are still very numerous, especially in Gujerat, the
 Rajput country, and Canara; they are generally an opulent

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(c) Alias Parswa, Paraswanatha, Colebrooke 9 Asiatic Researches 309.

(d) 9 Asiatic Researches 310, 311, (Colebrooke), and 1 H. H. Wilson's
 works by Rost 292.

(e) Ibid, pp. 107, 108.

(f) 1. H. H. Wilson's Works by Dr. Rost—pp. 346, 344.

1873. and mercantile class ; many of them are bankers, and possess
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Mr. Elphinstone's account of the *Jaina* sect is mainly taken from the late Mr. Erskine's description of it in Vol. III. of the Bombay Transactions ; but other authorities are also relied upon.

As to the same sect, much information has been collected by the late Colonel Mackenzie in the 9th Vol. of the Asiatic Researches, pp. 244 to 278 ; together with some particulars extracted from a journal kept by Dr. Buchanan during his travels in Canara pp. 279 to 286—but Dr. Buchanan subsequently published an account of his travels in that province. and in Mysore and Malabar, which, as to his views, may be consulted with more advantage (g) than the extract.

In the same Volume of the Asiatic Researches is a most valuable essay by Mr. Colebrooke on the sect of the *Jainas* (h).

At page 288 he says :—

" It appears from the concurrent result of all the inquiries which have been made that the *Jainas* constitute a sect of *Hindus*, differing, indeed, from the rest, in some very important tenets ; but following, in other respects, a similar practice, and maintaining like opinions and observances.

" The essential character of the *Hindu* institutions is the distribution of the people into four great tribes. This is considered by themselves to be the marked point, which separates them from *Mlech'has* or Barbarians. The *Jainas*, it is found, admit the same division into four tribes, and perform like religious ceremonies termed *Sanscaras*, from the birth of a male to his marriage. They observe similar fasts, and practice, still more strictly, the received maxims for refraining from injury to any sentient being. They appear to

(g) See especially Volume II. pp. 253 *et. seq.*, 488 *et. seq.* 2nd Edition published at Madras in 1870. There are other references to *Jainas* in the Index.

(h) pp. 287 to 322.

recognize, as subordinate deities, some, if not all, of the gods of the prevailing sects ; but do not worship, in particular, the five principal gods of those sects ; or any one of them by preference ; nor address prayers, or perform sacrifice, to the sun, or to fire : and they differ from the rest of the *Hindus*, in assigning the highest place to certain deified saints, who, according to their creed, have successively become superior gods. Another point, in which they materially disagree, is the rejection of the *Vedas*, the divine authority of which they deny : condemning, at the same time, the practice of sacrifices, and the other ceremonies, which the followers of the *Vedas* perform, to obtain specific promised consequences, in this world, or in the next."

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At page 291 Mr. Colebrooke continues : "Major (Col.) Mackenzie's information confirms that, which I had also received, concerning the distribution of these sectaries into clergy and laity.* In Hindustan the *Jainas* are usually called *Syauras* ; but distinguish themselves into *Sravacas* and *Yatis*. The laity (termed *Sravaca*) includes persons of various tribes, as indeed is the case with *Hindus* of other sects : but on this side of India, the *Jainas* are mostly of the *Vaisya* class (i). The orthodox *Hindus* have a secular as well as a regular clergy : a *Brahmana*, following the practice of officiating at the ceremonies of his religion, without quitting the order of a householder, may be considered as belonging to the secular clergy ; one who follows a wordly profession (that of husbandry for example) appertains to the laity, and so do people of other tribes ; but persons, who have passed into the several orders of devotion, may be reckoned to constitute the regular clergy. The *Jainas* have, in like manner, priests who have entered into an order of devotion ; and also employ *Brahmans* at their ceremonies ; and, for want of *Brahmans* of their own faith, they even have recourse to the se-

* See also the *Dabistan*, Vol. II., 211 to 213, 241.

(i) It includes eighty-four tribes : 9 *Asiatic Researches* 291, n ; I. H. Wilson's works by Rost 345.

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cular clergy of the orthodox sect." That concluding remark is confirmed by the evidence given at both sides in this case, and by Professor H. H. Wilson, who says—"The reader in a *Jaina* temple is a *Yati*, or religious character; but the ministrant priest, the attendant on the images, the receiver of offerings, and conductor of all usual ceremonies is a *Brahmana*." He treats this fact as "a natural consequence of the doctrine and example of the *Tirthankaras* who performed no rites, either vicariously, or for themselves, and gave no instruction for their observance." He regards it as showing that their faith "was a departure from established practices, the observance of which was held by the *Jaina* teachers to be a matter of indifference, and which none of any credit would consent to regulate;" and that "the laity were, therefore, left to their former priesthood, as far as outward ceremonies were concerned" (j).

At pages 251 252, of Vol. 9, Asiatic Researches, Colonel Mackenzie writes thus:—

"When a man dies, they burn the corpse, and throw the ashes into water; the rich cast the ashes into rivers. They never perform other obsequies, as their law says 'the spirit is separate or distinct from the body, which is composed of five elements; when, therefore, the corpse is burnt, the several parts which composed it return to their former state: consequently, to the deceased, no ceremony is due.' After death, as nothing of him remains, therefore they omit to perform the monthly and annual ceremonies, which other *Hindus* observe on this occasion; and they give these reasons in vindication—'A man should feed himself with the best food, while he lives in this world, as his body never returns after it is burnt.'

"They further say that the foolish people of other tribes, being deficient in sacred knowledge, spend money in vain, on

(j) H. H. Wilson's works by Rost, Vol. I., page 319, and see pp. 317, 342.

account of deceased relations : for how can a dead man feel satisfaction in ceremonies, and in the feeding of others ? ' Even a lamp no longer gives light by pouring more oil into it, after its flame is once extinguished.' Therefore it is vain to make feasts and ceremonies for the dead ; and if it be wished to please relations, it is best to do so while they are yet living ; ' what a man drinketh, giveth, and eateth in this world is of advantage to him, but he carrieth nothing with him at his end.' "

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The Abbé Dubois, in his work on the manners, &c., of the people of India (*k*), says of the *Jainas* :—

" They have no Tithi or days appointed for celebrating the memory of the dead, which is one of the most prominent institutions among the Brahmins. With the *Jainas* the dead are forgotten almost as soon as they are buried ; and in three days after the funeral there is no further mention of them." (*l*.)

The complete absence of any *Srāddha* (or *paksha*) ceremonies is also spoken of by many of the witnesses in this case, as characteristic of the *Mārvaḍi Jainas*, to which sect belong the present litigants.

An elaborate account of the *Jaina* sect is contained in the 1st Vol. of Professor H. H. Wilson's works recently edited by Dr. Reinhold Rost (*m*). The late Professor's views coincide with those of the other authors on the points with respect to which I have quoted from them. None of those authors say aught to countenance the existence of any difference in the law of succession amongst the *Jaina* sect and that of the orthodox Hindus.

The only instance in which I have discovered any hint of such a difference is in Colonel Tod's *Rajasthan*, Vol. II., p. 145 (*n*), where speaking of Marwar and the success of the *Jainas* resident there in commerce, he says :—" The wealth, acquired

(*k*) 2nd Ed. Madras p. 404.

(*l*) Acc. H. H. Wilson's works by Rost—Vol. 1, pp. 6 (*n*), 322.

(*m*) *Essays, &c., on the religion of Hindus*, Vol. 1, p. 276 *et seq.*

(*n*) 2nd Ed. Madras—See also Vol. 1, pp. 446 *et seq.* and 462, for further description of the *Jainas*.

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In 1833, *Máhá Rájá Govindnáth Ráy v. Gulál Chánd and others* (o) was decided by the Sudder Divani Adalut in Calcutta. The facts, now material in that case, are these : Utam Chand, a *Jaina* by sect, by a will in the form of a letter to Moti Chand, authorized his (Utam Chand's) wife to adopt a son for him, to be selected by Moti Chand ; and Moti Chand was directed by the will to make over the estate (situated at Dinagepore) to the son who should be so adopted. Utam Chand died. Moti Chand also died without making any selection, and after the deaths of both of them, the widow of Utam Chand adopted Gulál Chand as son to her deceased husband. The Court of Murshidabad, in 1827 A.D., upheld the adoption, and so did the Sudder Divani Adalut after consulting its Pandit, who gave this exposition of the *Jaina Shástra* : "The selection and adoption, by the widow, Mayakumari, of plaintiff (Gulál Chand) after the death of Moti Chand was legal ; for under all circumstances a sonless widow may adopt a son, just as may her husband, for the performance of rites. The sanction of her husband or the direction of the Yatis or priests is not essential. An elder son may be adopted as a

son; and the age qualifying for adoption extends to the thirty-second year. For legal adoption, the essentials, specified in the authorities subjoined, are required." A long passage alleged to be from the *Gautama Prasna* was amongst the authorities; and in this the power of the adopting widow to depose the adopted son in case of misconduct was declared. The Sudder Divani Adalut consulted several other pandits (including *Jainas*) on the right of the widow to depose the adopted son, and on her right to alienate, notwithstanding the adoption, but received conflicting opinions. As already stated, it pronounced the adoption to be valid according to the *Jaina Shástra*, and evaded giving any opinion as to the legality of a deposition by a widow of a person adopted by her as son to her deceased husband, as it held that the widow in that case had, by a compromise entered into by her with the adopted son *pendente lite*, estopped herself from relying on an alleged previous deposition of him by her.

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In a note to that case, the reporter, Mr. Sutherland, gives some texts of Vurddhamana cited from the *Gautama Prasna* by the Pandit first consulted by the Sudder Divani Adawlut in support of the validity of the adoption.

It is unnecessary for us now to say whether such an adoption as was made by the widow in that case would be valid according to the ordinary law administered to orthodox Hindus in this Presidency. (See *Purmanund v. Oomakunt*, 4 S. D. A. Rep., 318.) It would, however, be impossible, as we shall presently show, to accept, as a good reason for upholding it amongst *Jainas*, what the Pandit said as to "the performance of rites." It is unnecessary for us to say more as to the contention of the widow in that Bengal case in favour of a right to depose the adopted son*, and also to alienate the estate by compromise or otherwise, than that we are not to be understood as assenting to it. See *Nátháji v. Hari* (p).

* Vide Marsh 317. 1 Borr. 75. 4 Moo. Ind. App. 1. Ed.

(p) 8 Bom. H. C. Rep., 67, A. C. J.

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Hitherto, so far as we can discover, none but ordinary Hindu law has been ever administered either in this Island or in this Presidency to persons of the *Jaina* sect. Mr. Steele, speaking of the members of that sect in Poona, remarks (*q*) that they say they have books different from the Brahmanical *Shástras* which are consulted by their *Gurus* on occasions of penance. That they seemed ignorant of the contents of their books, "and would appear to consult Brahmins on most disputed points," and again he says (*r*):—"The *Jainas* in Poona generally consult Brahmins in all disputed questions of law, but they stated that books exist of their own, different from those of the Brahmins or Dharmasastr. Such are the Poonyawachun, Ubhishek and others, sometimes consulted on occasions of penance enjoined by the Jain Oopadya."

We have consulted a well-known oriental scholar, the Rev. Dr. Wilson, who we believe to possess a knowledge of the castes of Western India and their literature and customs, as extensive as that of any other living person whom it would be easy to name, and he has, with his usual courtesy and earnestness, afforded to us his assistance. He informs us that he is not aware of any authority in the books of the *Jaina* community or amongst the Hindu writers which would tend to support the custom alleged by the plaintiff here. Dr. Wilson has been informed by a learned *Jati* of the *Jaina* community and his Brahman assistant that they do not know of any such authority, that adoption is of rare occurrence amongst the *Jainas* and when resorted to, is regulated by the ordinary Hindu law, as is their succession to property generally. The evidence also in this case itself shows that notwithstanding the *odium theologicum* which the books speak of as existing, or having existed between the *Jainas* and the orthodox Hindus, yet in many matters Brahman intervention is sought by *Jainas* for instance in marriage ceremonies, in ceremonies on the inauguration of a new house, &c. And the fact, shown by Colebrooke, Wilson, and others

(*q*) p. 29, 1st Ed. (*r*) p. 102, 1st Ed.

that *Jainas* derive their origin from Hindus and are only a branch of an older stock, accounts for their retaining the same laws of succession, notwithstanding their divergence in religion.

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The recognition of the right of adoption amongst Hindus has been carried by the Courts of Justice in this Presidency at the least as far as it has been in any part of India, and farther than it has been in many parts (*s*). The Maratha school of Hindu law permits the widow to adopt a son on behalf of her husband without any express authority from him to that effect, provided he has neither said nor done anything which can be regarded as a prohibition to her or a refusal by himself when *in articulo mortis* to adopt (*t*). It has even been held here that the consent of the kinsmen of the husband is not essential to adoption by a widow, if the act be done in the *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive : *Rakhmabai v. Radhabai* (*u*). And see *Rupchand Hindumal v. Rakhmabai* (*v*) ; *Gopâl v. Náro* (*w*).

But it has never been decided that anybody except the widow can act vicariously for the man to whom the son is to be affiliated. She is herself but a delegate, either with express or implied authority ; she cannot extend that authority to another person so as to enable him to adopt a son to her husband after her decease. She does not adopt for herself but for her husband (*x*). And there is not, to our knowledge, any judicial decision to the effect that her husband could

(*s*) 7 Bom. H. C. Rep., 171 A. C. J., Ibid Appendix xvii., xxiv. xxvi.

(*t*) 7 Bom. H. C. Rep. Appx. 1.

(*u*) 5 Bom. H. C. Rep. 181 A. C. J. That decision is under appeal to the Privy Council.

(*v*) 8 Bom. H. C. Rep., 114 A. C. J. (*w*) 7 Ibid Appendix xxiv.

(*x*) 1 Stra. 78. 79. 2 Ibid 88, 91, 94, 98. 2 Beng. L. R. 101, P. C. C

Datt. Chand. S. 1 pl. 24. Suth. Syn. Head I, Notes V. and VI.

12 Moo. Ind. App. 350.

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authorize any person other than his widow to adopt on his behalf after his decease. In *Veerapermal Pillay v. Narrani Pillay* (y), Sir T. Strange said:—"I can find no authority for supposing that any but a widow can adopt after the death of her husband; and as to the idea of the executors themselves adopting, as was contended for, by virtue of the will, it is too preposterous to be entertained for a moment upon any principle of Hindu law." In Vol. I. of his treatise on H. L., p. 80, he, indeed, says "upon the Benares principle, it has been thought that an adoption by a *mother*, under an authority given her by her (dying) *son*, would be good." For this proposition he refers to a pandit's opinion given at p. 93 of the 2nd Vol. of his treatise on Hindu law, which was clearly wrong as remarked there by Mr. Colebrooke. Mr. Ellis seemed to think that if the son's widow were under age, he might authorize his mother to adopt, but Mr. Sutherland, who was much a better authority, especially on the subject of adoption, denied that the adoption by a mother for her deceased son would be valid—Ibid 94. In that case too, there would be only a single delegation; whereas in the present case a double delegation must be implied.

In 1867, the High Court at Calcutta held that *Jainas* are governed by the Hindu law of inheritance applicable in that part of the country in which the property is situate: *Lala Mohabeer Persad v. Mussamut Kundar Koover* (z). In that case the property was situate in Shahabad, a locality subject to the Mitákshará. It had been contended on the authority of an opinion of a pandit that, whether a sonless Hindu, being a *Jaina*, died divided or undivided from his brothers, his widow succeeded to his share, for which opinion the Pandit relied upon *Gautama Sanhita*. The Court (Peacock, C.J., and L. Jackson, J.) held that view to be wrong, and adhered to the Mitákshará law, but being of opinion that the deceased had been separated from his brothers, permitted the widow to

(y) 1 Notes of Ca. at Mad. 103.

(z) 8 Cal. W. Rep. 116 Cive. Rul.

succeed to his share. Peacock, C.J., said :—" If the members of a particular sect of Hindus claim to be governed by a particular law, and not by the ordinary Hindu law applicable to the district generally, we think it is for them to prove clearly as a matter of fact by Pandits, or other persons acquainted with their usages, by what rules their rights of inheritance are regulated. It was for the respondent in this case, as it was in the Shiva Gunga case, to show (if her case depended upon it) that the property did not descend according to the usual course of Hindu law prevailing in the district (see 9 Moore's Indian Appeals 608)."

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The term Hindu or Gentu, when used in Regulations, Acts, Statutes, and Charters in which Hindus or Gentus have been declared entitled to the benefit of their own law of succession and of contract, has been largely and liberally construed. See the remarks at pages 184, 185, 186, 5 Bom. High C. Rep. (*Lopes v. Lopes*), where Sir Edward Hyde East's evidence in 1830 before the House of Lords' committee is mentioned, in which he stated that Sikhs were treated as a sect of Hindus or Gentus, of which they were a dissenting branch. The authorities, already quoted, show that *Jainas* are regarded as a sect of Hindus. They are in fact much more akin to the Brahmanical Hindus than Sikhs can be deemed.

In the absence of express enactment, we are bound to follow "the usage of the country in which the suit arose; if none such appears, the law of the defendant, and, in the absence of specific law and usage, justice, equity, and good conscience alone : " Bombay Reg. IV. of 1827, Sec. 26.

Those words "the usage of the country in which the suit arose" should be liberally interpreted, and would comprise the ancient and clearly established usage of a tribe or caste, which, or some members of which, may have migrated from one part of India to another. They have been regarded as carrying their laws of succession and of marriage with them to their new domicile. See 12 Moo. Ind. App. 81, 91 (which was, however, a case in Bengal where the Regu-

1873. lations III. of 1793, Sec. 21, and VII. of 1832, Sec. 9, to
 BHAGVA'N- some extent differ from the Bombay Regulation above quoted).
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But when amongst Hindus (and *Jains* are Hindu Dis-
 senters) some custom, different from the normal Hindu law
 of the country, in which the property is located, and the
 parties resident, is alleged to exist, the burden of proving
 the antiquity and invariability of the custom is placed on
 the party averring its existence.

In the case of *Ramalokhmi Ammal v. Sivanantha Perumal*
 (17 Calc. W. Rep. 553 Civ. R.), decided on the 20th April
 1872, in the Privy Council, what is required to establish a
 special usage deviating from the ordinary law of succession
 was on the highest authority stated thus :—

“ Their Lordships are fully sensible of the importance and
 justice of giving effect to long-established usages existing in
 particular districts and families in India, but it is of the
 essence of special usages, modifying the ordinary law of suc-
 cession that they should be ancient and invariable; and it is
 further essential that they should be established to be so by
 clear and unambiguous evidence. It is only by means of
 such evidence that the Courts can be assured of their exist-
 ence, and that they possess the conditions of antiquity and
 certainty, on which alone their legal title to recognition de-
 pends.”

We would also express our adherence to the following re-
 marks made in *Naráyan Bábaji v. Náná Manokar (a)* which
 was a suit between Hindus :—

“ If any person shall aver a custom to the contrary ” (of
 the general rule of Hindu law in this Presidency) “ with re-
 spect to any particular kind of property, the burden of proof
 of such custom lies upon him, and ample and satisfactory
 evidence is necessary before the Court ought to admit, as es-
 tablished, any variation from the general rules of law regu-
 lating the devolution of property amongst Hindus. Were

the Court not to look with a jealous eye at attempts to establish local or caste customs in derogation of the general canons of descent amongst Hindus, the exceptions would soon become as frequent as the rule; and *Misera est servitus ubi jus vagum est*. However, if the evidence of an uninterrupted general custom be satisfactory and above suspicion, the Court is bound to give effect to the custom (b)."

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Like doctrine to that contained in the two cases already mentioned will be found in Calc. W. R. 1864—21, 23, 41, Civ. R.; 15 Calc. W. R. 47 P. C.; 16 Ibid 179 Civ. R.; 5 Bom. H. C. R. 200 O. C. J.; 2 Bac. Ab. Tit. custom; 3 Mad. H. C. R. 77; *Shidhojirāv v. Náikojirāv*, (*supra*) p. 228; and see 1 Mad. H. C. Rep. 420, 425; 3 Ibid 50, 55.

In this country it is no uncommon experience to find the custom alleged to be that which for the moment it is convenient to those who assert its existence that it should then be. I have known the most conflicting customs to be from time to time asserted to exist in one and the same sect. In a contest in the Supreme Court between the two widows of a deceased inhabitant of Kattiawar, I recollect that a deviation from the general law of nature was, upon affidavit, sworn to exist in that country. The object of the allegation being to establish the legitimacy of a child born to one of the widows nearly twenty-two months after the death of the husband, the swearing on her part was that twenty-two months was an ordinary period of gestation in Kattiawar. We find it necessary to scrutinize evidence of usage closely, and especially to demand specified instances of the custom.

11 R 2 Rom. p. 10

The authorities, to which we have referred, and which, as well as the admission made by almost all of the witnesses to whose evidence our attention has been particularly invited on behalf of the plaintiff, Rájmal, establish that the *Jaina* sect

(b) Calc. W. Rep. 1864, 39.

Calc. W. Rep. from 1862 to 1864 F. B. 97.

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totally discards the *Srāddha* (or *paksha*) ceremonies and disbelieves in their efficacy and pays little regard to sacrifice. This circumstance is fatal to the existence, amongst that sect, of the principal reason which renders adoption almost indispensable to the more orthodox Hindus when they are sonless, "the future beatitude of" such "a Hindu depending, according to the prevalent belief, upon the performance of his obsequies, and payment of his debts, by a son, as the means of redeeming him from an instant state of suffering after death. The dread is of Put, a place of horror to which the manes of the childless are supposed to be doomed; there to be tormented with hunger and thirst for want of those oblations of food and libations of water, at prescribed periods, which it is the pious and indeed indispensable duty of a son (puttra) to offer." See 1 Stra. H. L. 73, 74, 91, 94, 127, 129; Manu Ch. IX. pl. 137, 138; 3 Jag. Dig. by Colebrooke Bk. V. Chap. IV., Sec XV., pl. ccci. to cccxiii. (c). In Jagannatha's commentary on pl. cccxi. (p. 296), he says: "It is declared in the Veda that heaven is not for him who leaves no male issue. It consequently appears that celestial bliss is attained through a son." We have seen that the *Jaina* sect does not believe in the Vedas. It is true that, amongst the orthodox Hindus, obsequies may, in default of a son, be performed by the widow, or brother, or other heirs of the deceased, but not, in their view, with the same benefit as by a son. That a son, therefore, of some description is to such a Hindu, in a spiritual sense, next to indispensable is abundantly certain: 1 Stra. H. L. 76, and see the text of Brihaspati, 3 Jag. Dig. Bk. V., Ch. VIII., S. 1, pl. cccxcix. and the commentary upon it. (Brihaspati himself, however, was of the Atheistical school. He attacked the Vedas and the Brahmans, and ridiculed the *Srāddha* as a mere contrivance of the Brahmans to gain a livelihood: 1 Wilson's Works by Rost p. 6.)

(c) And see Ibid Bk. V., Chap. IV., S. II., pl. CXCVIII., and Datt. Mim. S. 1, pl. 3 *et seq*; Datt. Chand. S. 1 pl. 3 d; Suth. Hea I.

No doubt, the celebrity or perpetuation of the name of the adopter is also mentioned as a motive for adoption : Datt. Mim. Sec. 1, pl. 9 ; Datt. Chand. Sec. I. pla. 3 ; 1 Stra. H. L. 91 ; and it is the only reason for the adoption in the present case given by the witnesses. But it is only a secondary and worldly motive and carries with it none of the spiritual force of what Mr. Sutherland describes as " the primary reason for the affiliation of a son," namely, " the obligatory necessity of providing for the performance of the exequial rites, celebrated by a son for his deceased father, on which the salvation of a Hindu is supposed to depend."

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There is then, in the case of *Jainas*, a stronger reason for not extending the right of adoption beyond that allowed by precedent and text law to Hindus at large than in the case of the orthodox believers in Hinduism. We should, therefore, not relax in favour of *Jainas* the strict scrutiny which evidence of a custom opposed to the ordinary law and usage of the country demands.

We proceed now to consider the evidence of the alleged custom in the present case.

There have been several witnesses examined on behalf of the plaintiff, who state that there is a custom amongst the *Mār-vādi Jainas*, both at Ahmadnagar and in Marwar, of adoption where both adoptive parents are dead. Some of them speak generally as to the custom, but, as already stated, it is to specified instances that a Court of justice pays most attention. And this is particularly so where, as here, not a single *Yati* or *pandit* or priest or other expert either in the lore of the *Jainas* or of the Brahmins has been called to prove the alleged custom. The witnesses are chiefly shop-keepers or cloth-sellers or *gumasthás*. There does not appear to be a man of learning amongst them. They *unā voce* admit that they cannot point to any authority in the books of the *Jaina* sect which supports the alleged custom, nor do they pretend that it has ever been judicially recognized. There are, in the

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whole body of evidence to which our attention has been directed, only four specified instances of such adoption, and of these the most ancient is one which occurred about 22 years ago, and one of the four breaks down, inasmuch as the widow of the adoptive father was living when the adoption is alleged to have taken place.

The first instance mentioned in the evidence was where Jithmal Meghrāj gave his son in adoption to Prithirāj Vaidya after his death, and after the death of his wife Chimábái. This instance occurred about 2½ or more years ago, and is testified by witnesses Nos. 54, 55, 56, 60, 65, 69, 78, 83, 84, 85, 87, 88, 93.

The second alleged instance is that of Gangārām (or Kisands), who was given in adoption to Nathmal Chedan at Ahmadnagar, about five years ago, after Nathmal's death. But his widow was then living (60). That instance, therefore, fell short of the exigency of the alleged custom. It was testified by witnesses Nos. 55, 60, 94.

The third instance (also at Ahmadnagar) occurred 5 or 7 years ago. Gyanmal and his widow being then dead, Ratanmal the son of Kasturchand (brother of Gyanmal), was given to Gyanmal in adoption. It is testified by witnesses Nos. 55, 66, 92.

The fourth instance is that which is alleged to have occurred 22 years ago in Marwar, and is testified by the adopted son himself, a native doctor (No. 91).

Some of the witnesses for the defendant Bhagvāndās deny the custom, but admit the instance of the adoption of Jithmal's son as son to Prithirāj.

There are then but three perfect instances established in proof, and of these, the most remote happened less than quarter of a century ago. It is impossible to regard such cases as proof of an ancient, still less of an immemorial, custom, unsupported, as they are, by a single text from any book of authority amongst the *Jainas* themselves or amongst the

Hindus at large, or by any *pándit*, *yati*, priest, or other expert.

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For these reasons, we are of opinion that the plaintiff has failed to prove the existence of any such deviation from the Hindu law of this Presidency as he has asserted. The proceeding, which he says constituted an adoption, appears to us to have been a complete nullity, and not to be validated by the assent, although given, of the *Panch* of the caste, or of the senior members of it, in Ahmadnagar to the transaction. They had no power to establish any such custom, and could not clothe it with the antiquity which has not been proved, and which was essential to its legal existence. There must be not only a giving but an acceptance manifested by some overt act to constitute an adoption according to Hindu Law: 1 Str. H. L., 95; Manu, Ch. IX., pl. 168. Here there is said to have been a giving by the natural father, the uncle (defendant Bhagvándás), and two other persons, but to whom?—to two dead persons, the only two who could have adopted a son to the man. It has not been contended for the plaintiff that any person acted as their representative at the ceremony of the adoption, and as such accepted the plaintiff in adoption—not indeed that such vicarious acceptance would have been of any avail. There is not any good authority for saying that any person except the widow can accept a son on behalf of her husband (*d*). There has not then been any valid, legal acceptance. We must decline to carry the law of adoption in this Presidency to a point beyond the farthest limit which it has already reached, and least of all should we do so for a sect of Hindus which does not believe in the spiritual necessity or advantage of adoption.

Exhibit 36, being part and parcel of the abortive attempt at adoption, must fall with it. It was not sued upon by the

(*d*) See Special Appeal 645 of 1866 (*Kenchawa v Ningúpa*) decided 22nd April 1867 by Warden and Gibbs, JJ., in which the following judgment was given:—

“In this case, the question for our decision is whether, under the circumstances deposed to, we can hold that Manápá did adopt the

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plaintiff, but was produced merely as evidence of the adoption in his case. That document is wholly founded on the adoption, which being itself a mere nullity, there remains no ground on which the document can stand, and the defendant Bhagvándás is not estopped by it, even if he had been specially sued upon it. Its consideration has failed. It does not appear to have been ever acted upon in any respect, and

special respondent, Ningáppá. The Munsif held that there was no adoption, and the District Judge has reversed this decree and decided that there was. It is admitted at the bar that the parties are not Brahmans, and therefore that all that is required to establish the adoption is a "gift and acceptance," and it is necessary to see whether there were such. The fact, as found, appears to be, that Manápá's wife died of cholera, and on the return from the funeral, Manápá was seized with it. Some conversation took place regarding the adoption of an heir, and Manápá asked Ningáppá's father, Erápá, if he would give his son to him for adoption. Erápá assented and on Manápá being urged to go through the ceremony, he put it off until the morrow, when he died without doing any more in the matter.

It is argued by the pleader for Ningáppá that this amounted to a gift and acceptance, and that the subsequent acts of all parties in making Ningáppá light the funeral pile and perform the *śraddha*, show that the adoption was complete.

We had considerable difficulty in deciding this point, as certainly those acts of the family go far to show that Ningáppá was considered as the adopted son; but after a very careful consideration of the facts, we are forced to the conclusion that the evidence does not show that a legal adoption was made. In England, a will may be written out, the witnesses may be in attendance, and the dying man may have the pen in his hand, but if he dies before putting it to the paper, it is no will; and deciding about the family estate of a Hindu, we have come to the conclusion that we must as carefully and strictly examine the evidence as to the completion of the act of adoption, as the Courts at home would the execution of a will. Being, therefore, unable to find a formal "gift and acceptance," or any overt act of Manápá's which can be taken in that light, being in fact unable to find more than a request and a consent which from Manápá's own acts were evidently not deemed sufficient by him, but required that something more should be done to complete the adoption, we come to the conclusion that we must reverse the decree of the District Judge and confirm that of the Munsif, with all costs on the special respondent."

the adoption was disputed by Bhagvándás very shortly after the ceremony, and after the execution of No. 36 (see No. 79, No. 89). Inasmuch too as it clearly purported to deal with immoveable property and was not registered, it was open to such objections as might be based on Sec. 17 and 49 of Act XX. of 1866, but as we think it falls with the adoption, and as it (Exhibit 36) has not been sued upon, there is not any necessity for our deciding as to the extent to which those objections might affect it.

We reverse the decree of the Subordinate Judge, but under the circumstances of the case, direct that the parties respectively shall bear their own costs of the suit and appeal.

Decree reversed.

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[APPELLATE CIVIL JURISDICTION.]

LL R 2 Bom. L. 378.
LL R 1 Bom. L. 109.
LL R 1 Bom. L. 211.

Special Appeal No. 73 of 1873.

BASHETIA'PPA' BIN BASLINGA'PPA' AND

ANOTHER *Appellants.*

SHIVLINGA'PPA' BIN BALLA'PPA' (OR BIN VY-

JA'PPA' GANGER)..... *Respondent.*

Hindu law—Adoption—Giving in adoption by a brother—Natural father's consent—Son self-given.

Amongst Hindus in the Presidency of Bombay, a valid gift in adoption can be made only by the natural father or mother of the son given or by them both conjointly. They cannot jointly or severally delegate that authority to another person so as to validate a gift by him, made after they are both deceased.

Therefore, a gift in adoption by the brother of the adoptee after the decease of his father and mother, though made with the previous assent of his father, was held to be invalid.

Amongst Hindus in the same Presidency, an adoption of a son self given, although he may at the time of the gift be an adult, is in the present age (the *Kali Yug*) invalid.

THIS was a special appeal from the decision of W. Sandwith, Acting District Judge of Belgaum, affirming the decision of Dayáram Mayáram, First Class Subordinate Judge of the same place.

The appeal was argued before WESTROPP, C.J., and NANA-SHAI HARIDAS, J., on the 5th August 1873.

Shántarám Náráyán for the appellant.

Janárdan Sakháram for the respondent.

The facts and the arguments urged and authorities cited by each side fully appear from the judgment:—

Cur. ult. vult.

18th November, 1873, WESTROPP, C. J.:—The facts, as found by the District Judge, are, so far as material for the purposes of this Special Appeal, the following :—

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Vyjáppá Ganger, being entitled to an estate or interest (into the nature and extent of which it is unnecessary for us now to inquire) in a house at Belgaum, died without leaving any son, but leaving a widow, Shivlingavá, him surviving. She, subsequently to her husband's decease, demised, in September, 1869, that house to the first defendant, Bashe-tiáppá, for one year. Afterwards Shivlingavá went through the form of taking the plaintiff, Shivlingáppá, (who had shortly before attained the full age of 16 years), in adoption as son to her deceased husband, Vyjáppá. At that time, the natural father and natural mother of the plaintiff were dead. His elder brother, A'ppá, went through the form of giving the plaintiff in adoption to Shivlingavá, the widow of Vy-jáppá. The District Judge and the Subordinate Judge have respectively found that Balláppá, the natural father of the plaintiff, expressed his consent that the plaintiff should be adopted as son to Vyjáppá, and have referred to the depositions contained in Exhibits 27 and 31 as the evidence of that circumstance. The deponent in Exhibit 27 is A'ppá (or A'ppáya), the elder brother of the plaintiff, who says, "I gave to Shivlingavá the plaintiff, Shivlingáppá, in adoption. My father had agreed to give (him) in adoption. At the time of adoption, my father and mother were not alive. They were dead then. Four or five years ago, our father had given consent for the adoption. I do not know who were present when the consent was given." The witness does not say that he himself was present when the consent was given, or under what circumstances, or at whose request, it was given. It is difficult to understand how an experienced Judge could have been satisfied with such evidence of a consent, alleged to have been given four or five years previously to the adoption. As to Exhibit No. 31, it contains no legal evidence whatever of the consent of the plaintiff's father. The depo-

1873. nent Satmaláppá says : " The adoption took place in A'ppáya's house. Shivlingavá having gone to A'ppáya's house asked him—' As said by your father, will you give Shivlingáppá or not.' A'ppáya assented to this. He gave the boy in adoption. Shivlingavá took the boy in adoption." So far as regards the agreement of the father to give the plaintiff in adoption, this evidence is merely double hearsay, and we are astonished that the Judge should have referred to it as admissible at all to prove the consent of the father. However, there being some evidence in Exhibit No. 27, we unfortunately are bound to regard the finding that the father of the plaintiff did, at some time before his death, express his willingness to give the plaintiff in adoption as conclusive on that fact. But the father of the plaintiff died some four or five years before the adoption is said to have taken place, and the evidence of the consent (such as it is), though it may amount to evidence of an assertion by Balláppá of his willingness at one time that the plaintiff should be adopted as son to Vyjáppá, does not amount to a direct authorisation by Balláppá of the giving by his elder son A'ppá of the plaintiff in adoption, nor is it alleged that there was any delegation by Balláppá of that office or duty to A'ppá, and there is not any evidence as to whether or not Balláppá, up to the period of his death, continued willing to give the plaintiff in adoption to Vyjáppá or his widow.

On the expiration of the year, for which Shivlingavá had demised the house to Bashetiáppá, and subsequently to the alleged adoption of the plaintiff by her, he (the plaintiff) brought the present suit to recover the house from the defendants, both of whom denied the validity of the adoption, and consequently that the plaintiff had any title to sue. They also alleged that he was a minor—an allegation negatived by the findings of both of the Courts below—and they put forward another defence which was unsuccessful in those Courts, and into which, in the view which we take of this case, it is unnecessary for us to travel.

Both of the Courts below having decreed in favour of the plaintiff's claim to recover the house, the defendants have appealed to this Court.

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The question argued before this Court was : Whether the adoption was valid ?

For the plaintiff it was contended :—1st. That his natural father having, five years before the alleged gift, expressed his willingness to give, the gift by the plaintiff's brother was valid. 2ndly. That the plaintiff, being an adult at the time of the adoption, and there not being any evidence that he objected to the gift of him by his brother, the plaintiff must be regarded as having given himself in adoption, and that the Hindu law recognises such a gift.

No instance has been mentioned to us, in which, in this Presidency, the Sadr Adalat, or the Supreme or High Court, has recognised as valid an adoption, coming under either of those heads.

For the present, passing over the case of a gift in adoption by the adoptee himself, we should observe that the books of authority do not show that any one can give a person in adoption except his father or mother, or both conjointly. Manu says : "He is called a son given, whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress ; confirming the gift with water" : Chap. ix., pl. 168. The author of the Mitákshará, Ch. i., Sec. xi., pl. 9, says :—"He who is given by his mother with her husband's consent, while her husband is absent or after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son (dattaka). So Manu declares"—and then the author proceeds to quote the text already cited from Manu. Bálambhatta, commenting on that passage from the Mitákshará, adds that the mother may give in adoption when the father, though present, is incapable, or without his assent if he be dead, but does not mention any

1873. person other than the father or mother as capable of giving.
 BASHETIA' FPA Parāgara, styled by Colebrooke in his preface to Jagannatha's
 BIN Digest p. xvii. as "the highest authority for the fourth age,"
 BASLINGA' FPA describes the *dattaka* (or son given) thus: "He whom his
 v. father or mother gives, that boy becomes an adopted son,"
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 BALLA' FPA'. Parāgara Smṛiti iv. 24. Nilakantha in the Vyavāhara Ma-
 yukha (Chap. iv., Sec. v., pl. 1), after reciting the already
 quoted text of Manu, continues thus: "According to Madana:
 'the disjunctive 'or' means, that if the mother be not present,
 the father alone may give him away; and if the father be
 dead, the mother the same: but if both be alive, then even
 both.' From his using the word in distress, (it seems that) if
 not in distress, he must not be given." The text of Manu is
 echoed by Nanda Pandita in the *Dattaka Mīmāṃsā*, Sec. 1,
 pl. 7, and referred to and argued upon in Sec. iv. pl. 11 to
 pl. 21. In pl. 13 he says: "The husband, singly even and
 independent of his wife, is competent to give a son." In
 those passages, or in Sec. v., pl. 13 and 14 and 31, of the
 same author or elsewhere in his work, we do not find any
 giver in adoption contemplated except the father or mother
 or both. Nor in the *Dattaka Chandrika*, which is of high
 authority in the Southern part of this Presidency, does De-
 vanda Bhatta, when treating of giving in adoption (Sec. I,
 pl. 29 to 32), suggest that any one except the parents or
 one of them can give in adoption.

Thus we perceive that these authors (and Sir T. Strange,
 1 H. L., p. 81, concurs with them) provide for the case of
 the death or absence of the father alone, or for a gift by him
 altogether independently of his wife, (and therefore whether
 she be dead or absent,) but make no provision for a gift in
 adoption after the deaths of both the husband and the wife,
 and are altogether silent as to the possibility of a delegation
 of the power of gift of them or of either of them to any other
 person, kinsman or stranger.

In *Veerapermall Pillay v. Narrain Pillay* (a) Sir T

(a) 1 Madras Notes of Ca. 91, 127 *et seq.*

Strange, as Recorder of Madras, upheld an adoption, where the adoptee, his natural father being dead, was given in adoption by an elder brother, who signed the deed of adoption, which was made in the name of the family. The natural mother was living at the time of the adoption, but did not attend at the ceremony. Under those circumstances, Sir T. Strange considered himself bound to presume the consent of the mother. The reason, which he quotes from the opinion of the Shástris of Poona (b) that "the elder brother is the father revived," is not satisfactory, and has not been supported by any text of Hindu law to the effect that the elder son is so far a representative of his father as to be permitted to give a younger brother in adoption. And there has not been any text of Hindu law cited, nor have we been able to find any, which supports the argument that the father or mother may authorize any other person to give their son in adoption in the lifetime of both or of either of them. Still less is there any authority in Hindu law for saying that they or either of them may authorize a third person to do so after they are dead. Sir F. Macnaghten, in his Considerations on Hindu law (c), vigorously combated the ruling of Sir T. Strange in the case just mentioned. That case was decided in 1801 upon "comparatively imperfect materials," as Sir T. Strange himself candidly admits in his subsequently composed and justly celebrated treatise on Hindu law (*vide* Vol. 1, p. 102, Ed. of 1830); and the ruling, above mentioned as made by him, is inconsistent with subsequent cases, ex. gr., *Moothoosawmy Naidoo v. Lutchmydavummah* mentioned by Mr. Norton in his leading cases on Hindu law, Part 1, p. 66, *Mussumut Tara Muneé Dibia v. Dev Narayun Rai* (d), *Subbáluvammál v. Ammákutti Ammál* (e), and *Balvantráv v. Bayábái* (f).

(b) Ibid. 131, 132. (c) p. 210.

(d) 3 S. D. A. Rep. 387, and See 1 Ibid 169; and 1 W. Macnaghten H. L. 66.

(e) 2 Mad. H. C. Rep. 129. (f) 6 Bom. H. C. Rep. O, C. J. 83.

1873. We have come to the conclusion that the Hindu law, as
 BASHETIA'PPA' current in this Presidency, does not permit a man after the
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 BASLINGA'PPA' decease of his father and mother, either with or without the
 v. authority of both or of either of them, to give his brother in
 SHIVLINGAP' adoption. Accordingly the first branch of the argument for
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 BALLA'PPA' the plaintiff fails.

Were it competent (which it is not) for us to sanction a giving in adoption by a brother, although such a gift is wholly unrecognized by the works on Hindu law of highest authority in this Presidency, we think it would be far from desirable to extend the law of adoption in that direction. Such an extension would leave it in the power of an elder brother to thin the ranks of his fellow parceners by bestowing his younger brethren in adoption in a manner highly detrimental to the interests of the latter.

As to the second branch of the argument for the plaintiff, the first remark to be made is that there is no direct evidence to the effect that he did give himself in adoption to Shivlingavá. Vijnyáneshvara, at Ch. 1, Sec. XI, pl. 18 of the Mitákshára, describes the self-given son thus: "The son self-given is one, who being bereft of father and mother, or abandoned by them, presents himself saying 'let me become thy son'—and Mr. Colebrooke, in his note upon that text cites this text from Apararka:—"He who, unsolicited, gives himself saying 'let me become thy son,' is called a son self-given (svayandatta)," and this further text from Manu: "He who has lost his parents, or been abandoned by them without cause, and offers himself to a man as his son, is called a son self-given" (g). There is no evidence that the plaintiff was unsolicited by Sivlingavá, or that he offered himself to her or said to her "let me become thy son." The evidence is in fact of a different complexion. Assuming, however, that a strict conformity with these details was not necessary, and that the plaintiff, being an adult at the time

(g) Manu, Ch. IX., pl. 178.

of the adoption, must, in the absence of any evidence that he objected to the gift of himself by his brother, be regarded as having, in effect, given himself in adoption to Shivlingavá we proceed to consider whether at the present time such a gift in adoption is valid.

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The twelve kinds of sons, enumerated by Manu (*h*) and in the Mitákshará (*i*), were formerly capable of succession for the double purpose of obsequies and of inheritance (*j*). Among these the first is the issue male of the body lawfully begotten, the seventh is the son given (dattaka), the eighth is the son bought (krita), the ninth is the son made (kritrima), and the tenth is the son self-given. It is unnecessary here to specify the others (*k*).

Nilakantha, after enumerating the twelve sons (*l*), describing the first, the legitimate son (aurasa), procreated on the lawful wedded wife, as the principal (*m*), and the others as secondary, and after referring specially to some of the latter, says (*n*): "Here we must mark, that with the exception of the given son, [all the other ten] secondary sons are set aside in the Kali or present age, for we read, in the prohibitions of it: 'the acceptance likewise of affiliations, other than those of a legitimate and adopted son.'"

The same doctrine is laid down in the general note to the translation of Manu, pp. 428 to 431, and especially pl. 8 and 9 in the last mentioned page, where the passage from the Aditya Purána, to which we shall presently again refer, is thus rendered: "8. The filiation of any but a son legally begotten or given in adoption *by his parents*; the desertion

(*h*) Ch. IX., pl. 158, *et seq.*

(*i*) Ch. I, Sec. XI., pl. 1 *et seq.*

(*j*) Miták: Ch. I, Sec. XI., pl. 31, 33; Ch. II. Sec. I., pl. 1.

(*k*) Vide Dattaka Mímánsá, Sec. 1, pl. 33, *et seq.*; and 2 Stra. H. L. 194 *et seq.*

(*l*) Vyavahára Mayukha, Ch. IV., Sec. IV., pl. 41.

(*m*) Ibid pl. 42.

(*n*) Ibid pl. 46. As to the son given, see 2 Stra. H. L. 213, Ed. of 1830.

1873. of a lawful wife for any offence less than actual adultery.
 BASHETIA' PPA' 9. These *parts of ancient law* were abrogated by wise legis-
 BIN lators, as the cases arose at the beginning of the Kali age
 BASLINGA' PPA' with an intent of securing mankind from evil." And in
 v. Jaganatha's Digest, Vol. III., Bk. V, Sec. 8, pl. cclxxx.
 SHIVLINGA' P- we again find the same text thus: "*Aditya Purana*. The
 PA' BIN filiation of any but a son legally begotten, or given in adop-
 BALLA' PPA' tion *by his parents, is a part of ancient law abrogated in the
 Kali age.*" And see to the like effect Ibid Sec. 15, pl. ccc.,
 Vol. 3, p. 288, and Steele, 1st Ed: pp 49, 183.

And Nanda Pandita, after quoting as follows from Vrihaspati: "Sons of many descriptions who were made by ancient saints cannot now be adopted by men: by reason of their deficiency of power, &c.," continues thus (p): "On account of this text of Vrihaspati, and because in this passage 'There is no adoption, as sons, of those other than the son given and the legitimate son.' Other sons are forbidden by Caunaka; in the Kali or present age, amongst the sons however (who have been mentioned) the son given and the legitimate son only are admitted." 65. "The term 'given' is inclusive also of the son made (Kritrima) on account of a text of Parāgara, on the occasion of treating on the law of the Kali age, which expresses, 'the son of the body' (Aurasa), the son of the wife, also, the son given, the son made &c." 66. "Nor is it to be argued from this that, in the Kali age, there may be the son of the wife (technically so called): for, such is forbidden, by the mere prohibition against the appointment in that age [of a wife to raise issue to her husband by another]." 67. "Should it be contended that then an option would proceed from the wife's son being ordained: and forbidden (by different authorities): it is wrong: for many objections would be the consequence." 68. "Again if it be asked, in what light then the mention of the son of the wife in this passage (must be regarded)? We reply, as an epithet of Aurasa (the son of the body). Ac-

(p) Dattaka Mimānsa, Sec. I, pl. 64.

cordingly Manu says : ' Him whom a man has begotten on his own wedded wife, let him know to be the first in rank, as the son of his body (Aurasa). ' "

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Devanda Bhatta, after referring to the principal and secondary sons, the latter of whom he describes as substitutes, says (q) : " Of these however, in the present age, all are not recognized. For a text recites ;—' sons of many descriptions who were made by ancient saints cannot now be adopted by men,—by reason of their deficiency of power ' ; and against those other than the son given, being substitutes, there is a prohibition in a passage of law wherein after having been premised,—' the adoption, as sons of those other than the legitimate son and son given, ' it is subjoined —' These rules sages pronounce to be avoided in the Kali age. ' " The first text there quoted by Devanda Bhatta is that of Vrihaspati already mentioned as cited by Nanda Pandita. The second text (' passage of law, ') relied on by Devanda Bhatta, and apparently also by Nanda Pandita, is attributed to the Aditya Purána, and Mr. Sutherland says is, in its complete state, thus : " The adoption, as sons of those other than the legitimate son, and son given ; the procreation of issue by a brother-in-law ; the assuming the state of an anchoret ; these rules sages pronounce to be avoided in the Kali age. " Devanda Bhatta, in his other work, the Smriti Chandriká (Chap. x., pl. 5 to pl. 12, Kristnaswamy Iyer's translation, pp. 142, 144) speaks to the same effect as in the Dattaka Chandriká. In the Dharmasindhu (pp 122, 123, first half, third division) it is said : " In the Kali age, the son lawfully begotten and the son given are the two sons known. The other ten kinds of sons, the bought and the rest, are to be avoided in the Kali age. In the Kaustubha, however, it is said : a third also, the self given (son) is permitted, and only nine are prohibited in the Kali age. " In the Nir-nayasindhu (pp. 62, 63, first half, third division) it is, *inter alia*, stated that : " Recognition, as sons, of others than those given or lawfully begotten (is forbidden). "

(q) Dattaka Chandriká Sec. 1, pl. 9.

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Mr. Sutherland, at the commencement of his Synopsis, observes: "It should be premised, that in the present age, amongst the various subsidiary sons recognized in codes of law, according to the authority of writers, confirmed by practice, only those technically denominated the son given (Dattaka or Dattrima) and son made are capable of being affiliated. The author of the Dattaka Chandrika indeed admits the son given alone.—In effect however, without any great latitude, a son self-given, and a son rejected, might *perhaps* be included under the general denomination of the 'son made,' the Kritrima or Krita putra (vulgarly called 'Karta puter'): and it should not be omitted that in treatises of law, the term Dattaka or son given is sometimes used to denote an adopted son generally."

This conjecture of Mr. Sutherland has not been adopted, so far as we can discover, by the Sadr Adalat, Supreme or High Court in this Presidency. For this there seems to be good reason. The author of the Vyavahāra Mayukha clearly excludes from adoption in the present age all of the secondary sons except the son given, *i.e.*, the seventh of the twelve sons whom he enumerates. He distinguishes him in the plainest way from the eighth (the son bought), the ninth (the son made), and the tenth (the son self-given), and the other secondary or subsidiary sons (*r*), and it would seem to be a direct contravention of his doctrine and of his grammar to maintain that he, whose authority is so great in this Presidency, sanctions the adoption either of the son bought, the son made, or the son self-given. He has evidently, in making "the exception of the given son," used the term given son (dattaka or dattrima) in its most strict technical signification (*s*).

Nanda Pandita also, as we have seen, excepts the son given, but he goes beyond Nilakantha in including within that term the son made (Kritrima). By expressly so includ-

(*r*) Vyav. Mayukha, Ch. IV., S. IV., pl. 41, 46.

(*s*) Ibid, pl. 46.

ing the son made, he must be regarded as excluding the son bought and the son self-given, for *expressum facit cessare tacitum*, or *expressio unius*, &c. It is unnecessary for us now to say whether we should be disposed to follow Nanda Pandita so far as to recognize the adoption of the son made, notwithstanding the opposite doctrine of Nilakantha. It is enough to say that we do not know of any instance in this Presidency, in which an adoption of the son made (Kritrima) has been declared by the Courts to be valid. In some other parts of India, such an adoption has, even in this age, been sanctioned (Vide 2 Stra. H. L. 203, 204, 208, 209; *Mussamut Shibo Koeree v. Joogun Sing (t)*; *The Collector of Tirhoot v. Huopershad (u)*; and *Luchmun Lall v. Mohun Lall (v)*).

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We regard Devanda Bhatta as holding the same views as those of Nilakantha, who excludes all of the secondary sons except the son given, in the strict technical meaning of that phrase, viz., the son whom his father or mother gives, or both of them give in adoption, and not implying the inclusion of the son bought, the son made or the son self-given—all of whom Devanda Bhatta, as well as Nilakantha, has specified amongst the secondary sons, and distinguished from the son given.

Sir Thomas Strange (1 H. L. 75), having mentioned the twelve sorts of sons, proceeds thus: "And now these two, the son by birth, emphatically so called (Aurasa), and (Dattaka) the son by adoption, meaning always the son *given*, are, generally speaking, the only subsisting ones, allowed to be capable of answering the purpose of sons; the rest, and all concerning them, being parts of ancient law, understood to have been abrogated, as the cases arose at the beginning of the present, the Kali age. It is so stated in the 'General Note' at the end of the translation of Manu, and elsewhere repeated; though it has been disputed; and it is true that, in some of the Northern provinces, forms of

(t) 8 Calc. W. Rep. Civ. Rul. 155.

(u) 7 Ibid. 500.

(v) 16 Ibid. 179.

1873. adoption, other than that of the Dattaka, at this day prevail.”
 BASHETIA'PFA' And Sir T. Strange, in his 2nd Vol. p 188, gives the opinion
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 BASLINGA'PFA' of the thirteen Pandits at the Court of the Rajah of Tanjore
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 PA' BIN the son of the body and the given son, is not limited to the
 BALLA'PFA'. twice born classes, but is also applicable to Sudras.

Messrs. West and Bühler (*w*) remark “that, with the exception of the son given, (all other) secondary sons are set aside in the Kali (or present age).”

It has, moreover, been held in this Court that an orphan cannot be adopted according to the Hindu Law administered in this Presidency: *Balvantráv Bháskar v. Bayábái (x)*. There has been a similar decision in Madras: *Subbálvammál v. Ammakutti Ammál (y)*. Both of these cases have already been mentioned with reference to the first branch of the argument on behalf of the plaintiff.

For these reasons, we think that the plaintiff has failed in the second branch of the argument on his behalf, and that, even though he be regarded as a son self-given, his adoption by Shivlingavá cannot be sustained.

The plaintiff not having succeeded on either branch of the argument, we must declare the alleged adoption of him by Shivlingavá as son to her deceased husband, Vyjápá Ganger, to have been invalid, and unwarranted by Hindu Law.

We, accordingly, reverse the decrees of the Subordinate Judge and of the District Judge respectively, and we dismiss the plaintiff's suit, but, under the circumstances of the case, without costs.

Decree reversed and suit dismissed.

(*w*) Vol. 1, p. 45.

(*x*) 6 Bom. H. C. Rep. 83. O. C. J.

(*y*) 2 Mad. H. C. Rep. 129.

NOTE:—This judgment was perused and concurred in by Mr. Justice Nanabhai Haridas before he left the Bench, but it was not delivered until afterwards, the pleaders on both sides agreeing to accept it as the judgment of the Court.—Ed.

[IN THE PRIVY COUNCIL.]

1873.
December 4.

MAHA'RA'NA' FATESANGJI

JASVANTSANGJIPlaintiff and Appellant.

DESA'I KALLIA'NRA'YAJI

HUKAMATRA'IJIDefendant and Respondent.

Todá Girás—Limitation—"Interest in Immoveable Property"—Act XIV. of 1859, Sec. 1, cl. 12 and 16.

In a suit brought by the plaintiff to establish his right to a *Todá Girás hak*, and for arrears of it, it was held, (reversing the decision of the High Court,) that *Todá Girás* is an interest in immoveable property, and, as such, falls within clause 12, and not within clause 16, of the first section of Act XIV. of 1859.

The term "immoveable property," as used in that Act, is not limited to lands and houses only. It comprehends certainly all that would be real property according to English law, and possibly more.

The principle, which prevailed in *Krishnabhat v. Kapabhat* (6 Bom. H. C. Rep., 137 A. C. J.), and in *Balvantrav v. Purshotam Sidheshvar* (9 Bom. H. C. Rep. 99.) viz. :— 'that as the term "immoveable property" is not defined in the Act, it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as "immoveable," although not so in the ordinary acceptance of that word,'—approved.

THE facts of this case will be found in Vol. IV., Bom. H. C. Rep. 189, A. C. J. Against the decision in Special Appeal of WARDEN and GIBBS, JJ., there reported, the plaintiff appealed to Her Majesty in Council. The appeal was argued, in November 1873, by Mr. Forsyth, Q.C., and Mr. J. S. White for the appellant, and by Mr. Doyne for the respondent, before the Judicial Committee, the following members being present :—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, SIR ROBERT P. COLLIER, and SIR LAWRENCE PEEL (Assessor).

On the 4th December 1873 their Lordships gave this judgment :—

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1873. The suit, which has given rise to this appeal, was brought
 MAHA'RA'NA' by the appellant in January 1865, against the respondent,
 FATESANGJI to establish the right of the former to a *Todá Girás hak*
 v. upon the *Inám* village of the latter, and to recover the arrears
 DESA'I KAL- due in respect of that *hak*, for the seven years preceding the
 LIA'NRA'TAJI. commencement of the suit. The annual amount alleged to
 be payable by the respondent to the appellant is Rs. 501 ;
 though it may be questionable on the evidence whether this
 sum is the gross amount of the *hak*, or the net balance after
 deducting certain small payments and allowances to other
 persons which are entered in the accounts.

The respondent admitted, as his father in other proceed-
 ings had admitted, the existence of the *hak*, and that it had
 been paid by the *inámdárs* of the village up to the Samvat
 year 1914 (corresponding with 1857-58) ; but contended that
 his father had then properly exercised a right to put an end
 to it ; and, further, that the present suit was barred by the
 law of limitation.

The issues settled are at page 20 of the record ; but the
 only one which is to be considered on this appeal is, whether
 the claim is within the appropriate period of limitation or not.
 Of the remaining issues, one, which is no longer treated
 as material, was disposed of in the appellant's favour, and
 the others have not been tried.

The substantial question considered in the Court below
 was, whether the suit, being one for the recovery of an
 " interest in immoveable property " fell within the 12th, or
 was to be governed by the 16th, clause of the 1st section of
 Act XIV. of 1859. In the former case, the period of limita-
 tion would be twelve years, and the suit would be brought
 in time ; in the latter case, the period of limitation would be
 only six years, and the suit would be barred.

The determination of this question involves the considera-
 tion of the nature of a *Todá Girás hak*. A good deal of
 learning on this subject is to be found in the case of the

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Collector of Surat v. Pestonjee Ruttonjee (a) and in the case of *Sumbhoolall Girdhurlall v. the Collector of Surat (b)*, to which their Lordships have been referred. They do not think it necessary to go at any length into this. It is sufficient to state that these annual payments, although originally exacted by the *Grasias* from the village communities in certain territories in the west of India by violence and wrong, and in the nature of blackmail, had, when those territories fell under British rule, acquired by long usage a quasi-legal character as customary annual payments; that as such they were recognized by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue, and left the liability to pay such of them as were payable by *Inám* villages to fall on the *Inámdár*. And since the decision of the before-mentioned case in the 8th vol. of Moore, it cannot be questioned that the *Todá Girás haks* of the former class constitute a recognized species of property capable of alienation and of seizure and sale under an execution. How far that decision may govern the rights of an *Inámdár*, and some of the questions raised by the untried issues in this suit, their Lordships abstain from considering. For the purpose of determining the question of limitation, it must be assumed that the claim of the appellant, if not barred, has a legal foundation.

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The question, to which period of limitation these claims are subject, has been the subject of several decisions in the Bombay Courts.

The earliest of these, being the case of *The Collector of Surat v. Tejoobawa Bhugwansangji*, which is set out at p. 67 of the record, does not materially affect the present question. When that suit was commenced, Act XIV. of 1859 had not come into operation; and under the law then in force (the Bombay Regulation V. of 1827) the claim was subject only to the twelve years' rule of limitation, whether a *Todá Girás hak* was in the nature of moveable, or of immoveable

(a) 2 Mor. Ca. S. D. A. 291.

(b) 8 Moo. Ind. App. 1.

1873. property. It is true that the High Court, in delivering its judgment, intimated an opinion that, whatever might have been the original nature of that *Todá Girás* payment, its conversion into an annual payment out of the Government Treasury, not secured or chargeable on any particular lands, had deprived it of the character of immoveable property, if it ever possessed that character. But it is obvious that this dictum has no application to a *Todá Girás hak* payable by an *Inámdár*, in respect of which there has been no such conversion. The case of *Purushram Nurbheram v. Syud Hossein* which is set out at pp. 69 and 72 of the record, is, however, in point. There the question arose between the purchaser of the *Grasia's* interest in a *Todá Girás hak* at an execution sale, and an *Inámdár*; and the law of limitation to be applied was Act XIV. of 1859. The Judge of Broach there held (and his decision was affirmed on appeal by the High Court) that the claim was clearly for a money payment, and that the case must be decided by the 16th clause of the 1st section of the Statute.

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The authority of this last case has been recognized, and its ruling adopted by each of the three judgments now under appeal.

The other decisions of the High Court of Bombay, which have been cited, are all distinguishable from the present.

That of the *Collector of Surat v. the Heiresses of Kuvarbái* (c) seems to their Lordships to have no bearing upon the question before them. The only questions raised in it were whether a *Todá Girás hak* was alienable, and whether, by reason of its falling within the definition of "land" contained in a particular statute (which it did not), the Court was deprived of jurisdiction. In the case of *Bháratsangji v. Navanidharáya* (d), as in that set forth at p. 67 of the record, the law of limitation to be applied was the Bombay Regulation V. of 1827; and what the Court actually decided was,

that the right to the *desāigiri* allowance claimed would be barred, unless the plaintiff could establish the receipt of a payment on account of it within twelve years. The Court, no doubt, described the allowance claimed as "in the nature of one charged upon, or payable out of land." But whether it were so or not, was not a point in issue. Again, in *Rāiji Manor v. Desāi Kallidānrāi* (e) the Court, in ruling that the claim was barred by the six years' limitation, distinguished it from the last-mentioned case on the ground that it was a claim for a *pagdi* allowance, which was a mere money payment out of a *desāigiri* allowance, and not like the latter in any sense an interest in land. The same distinction may exist between a *pagdi* allowance and a *Todā Girās hak*.

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The case of *Krishnabhat v. Kapābhat* (f), and that of *Balvantrāy v. Purshotam Sidheshvar* (g), both relate to hereditary offices and not to *haks*, and cannot, therefore, be regarded as directly in point, although the principles which they lay down for the construction of Act XIV. of 1859 are important, and will have to be considered hereafter. It is, however, to be remarked that, in the latter case, Chief Justice Westropp, at the close of his able and elaborate judgment, expressed a strong doubt of the soundness of the decisions which had ruled that claims for *Todā Girās haks* were subject to the six years' rule of limitation. This being the state of the authorities at Bombay, their Lordships cannot think that there has been that long and consistent course of decisions which affords grounds for treating the question under consideration as concluded by authority, even in the Courts of India.

It has, however, been strongly urged on the part of the respondent that this appeal is to be determined by the authority of their Lordships' recent decision in the case of *The Government of Bombay v. Desai Kullianrai Hakoomutrai* (the present respondent) (h). Their Lordships cannot accede to this argument.

(e) 6 Bom. H. C. Rep. A. C. J. 56.

(f) 6 Bom. H. C. Rep. A. C. J. 137. (g) 9 Bom. H. C. Rep. 99.

(h) 14 Moo. Ind. App. 551.

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In the case so relied upon the question of limitation did not arise. It is, however, true that, in deciding it, the High Court of Bombay had held that the respondent had acquired a title, by positive prescription, to the *hak* which he claimed by force of the 1st section of the Bombay Regulation V. of 1827 ; and that their Lordships, though they upheld the decree in favour of the respondent on other grounds, intimated that they were not satisfied either that the particular *hak* could properly be said to be "immoveable property" within the meaning of the Regulation, or that there had been such an enjoyment of it for thirty years without interruption, as would bring the right, if in the nature of immoveable property, within the operation of the Regulation. This was the expression of a doubt rather than a positive decision. Moreover, the *hak* then claimed differed widely from that which is the subject of the present suit. It was a money allowance for the sustentation of a palanquin, which had been granted by the then native power to an ancestor of the respondent, not as a necessary incident to the office of *Desái*, but as a reward for meritorious service, and was made payable by the native collector out of the general revenues of the pergunnah of Broach received by him. As such it resembled the annuity granted by King Charles the Second out of the Barbadoes duties, which, in the case of the *Earl of Stafford v. Buckley* (i), Lord Hardwicke held to be "a mere personal annuity, having no relation to lands and tenements, or partaking of the nature of a rent by any means." But, however, that may be, their Lordships cannot treat the decision in the *pálkhi* case as an authority on the present question, which they will now proceed to consider upon its merits.

The learned counsel for the appellant have argued, on the authority of the above-mentioned cases of *Krishnabhat v. Kapábhat*, and *Balvantráv v. Purshotam Sidheshvar*, and particularly of the latter, that the construction of the Statute of Limitation must, in this particular case, be determined by the light of the Hindu law.

(i) 2 Ves. Senr. 170.

According to the report of the latter case in 9 Bom. H. C. Rep. 99, the respondents had sued to recover from the appellants the amount of fees due to the holder of the hereditary office of village *Joshi* (or astrologer) for five years. This statement their Lordships conceive must be taken to import that the right to hold the office was matter of contest between the parties ; since it can hardly have been held that, because the hereditary office was, in contemplation of the Hindu law, of the nature of immoveable property, fees recoverable by the admitted holder of the office from persons whose horoscope he might have cast, fell within the same category.* The case was referred to a Full Bench, partly in consequence of some difference of opinion between the two Judges who composed the Division Bench, and partly on account of a supposed inconsistency between the two decisions already cited from the 6th Vol. of the Bom. H. C. Reports, which, nevertheless, seem to their Lordships capable of

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* An examination of the record in that case (*Balvantrav v. Purshotam Sidheshwar*) shows that the title to the office was in contest between the parties. The plaintiffs, claiming as mortgagees of an eight-anna share in the hereditary office of village *Joshi* from Rámchandra Krishna, sued his co-sharers in the office to establish the plaintiff's right as such mortgagees to a moiety of the *Joshi's haks*, the whole of which they alleged the defendants to have received for some years previously to the suit. The defendants denied the validity of the alienation (by mortgage) by Rámchandra to the plaintiffs, and relied on Reg. XVI. of 1827 Sec. 20 and Act XI. of 1843, Sec. 15, as showing the inalienability of the office, which point the Subordinate and Assistant Judges overruled, being of opinion that the office of village *Joshi* did not fall within these enactments. The defendants also (*inter alia*) relied on the Limitation Act XIV. of 1859. This defence also failed in both Courts. The District Judge held that as Rámchandra had received sums on account of his share down to the year 1860, and the suit was instituted in 1869, it was not barred, inasmuch as the twelve year and not the six year limit was applicable to it. The defendants specially appealed to the High Court. The special appeal was argued before a Division Court consisting of West and Gibbs, JJ., who referred the question of limitation to a Full Bench as reported in 9 Bom. H. C. R., 99, and on receiving the reply, affirmed the decree of the Subordinate Judge.—Ed.

1873. standing together. The judgment of the Full Bench was given by Chief Justice Westropp. It fully upheld the decision in *Krishnabhat v. Kapábhat*, and affirmed the correctness of the rule there laid down for the interpretation of Act XIV. of 1859, Sec. 1, Cl. 12. The rule is shortly this, viz., that inasmuch as the term "immoveable property" is not defined by the Act, it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as immoveable, although not such in the ordinary acceptation of the word. To the application of this rule within proper limits, their Lordships see no objection. The question must, in every case, be whether the subject of the suit is in the nature of immoveable property, or of an interest in immoveable property; and if its nature and quality can be only determined by Hindu law and usage, the Hindu law may properly be invoked for that purpose. Thus, in the two cases on which the appellant relies, Hindu texts were legitimately used to show that, in the contemplation of Hindu law, hereditary offices in a Hindu community, incapable of being held by any person not a Hindu, were in the nature of immoveables. And those decisions receive additional support from the 1st section of the Bombay Regulation V. of 1827, which expressly declares hereditary offices to be immoveables—an enactment which, inasmuch as it relates only to the acquisition of a title by positive prescription, seems to be unaffected by Act XIV. of 1859, and to stand unrepealed in the Presidency of Bombay.

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The learned counsel for the appellant have, however, insisted on the authority of these decisions that a *Todá Girás hak* must be held to be an interest in immoveable property, because, according to Hindu law, it would be "*Nibandha*." Their Lordships, in dealing with this argument, prefer to use the Sanscrit word, inasmuch as they do not think that "corrody" is a very happy translation of it; "corrody" being a word of medieval origin, properly signifying a peculiar right, viz., the grant by the royal or other founder of an abbey of

certain allowances out of the revenues of the abbey in favour of a dependant or servant. (See Ducange, *in verbo* * : Fitzherbert "*De naturâ Brevium*," p. 229, writ "de corrodio habendo.")

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Whether a *Todâ Girâs hak* be "*Nibandha*" within the strict sense of that term is, in their Lordships' opinion, a question not free from doubt. The original text of Yajnyawalkya, which is the foundation of all the other authorities cited by Chief Justice Westropp, implies that the subject rendered by the word corrody in Colebrooke's Digest, Book II., Ch. iv., Placitum xxxiv., is something created by Royal grant. This, too, is included in Professor Wilson's definition of "*Nibandha*." That the word in the subsequent glosses on Yajnyawalkya's text is used in a wider sense, may be due to the want of precision for which Hindu commentators are remarkable. It is, however, unnecessary to consider this point, because their Lordships are of opinion that the question, whether a *Todâ Girâs hak* is an interest in immoveable property within the meaning of Act XIV. of 1859, is one which ought not to be determined by Hindu law. It appears from the authorities cited in the case (reported in the second vol. of Morris's Reports), that the *Grasias* were sometimes Muhammadans, and, therefore, that the *hak* may, in its inception, have been held by a Muhammadan. It is certain that, as these *haks* now exist, they may pass to, and be held and enjoyed by, Muhammadans, Parsis, or Christians; and their Lordships think that the applicability of particular sections of this general Statute of Limitation must be determined by the nature of the thing sued for, and not by the status, race, character, or religion of the parties to the suit. The period of limitation, within which the claim is barred, must be fixed and uniform by whomsoever that claim is preferred or resisted.

* *Conredium alias corrodium alias correda*. See also Wharton's Law Lexicon.—Ed.

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The determination, therefore, of the present question depends, in their Lordship's opinion, upon the general construction to be given to the term "immoveable property" and "interest in immoveable property" as used by the Indian Legislature. Their Lordships cannot think that the former term is identical with "lands or houses." They conceive that the word "immoveable" was used as something less technical than "real," and that the term "immoveable property" comprehends certainly all that would be real property according to English law, and possibly more. In some foreign systems of law in which the technical division of property is into moveables and immoveables, as, *e.g.*, the Civil Code of France, many things which the law of England would class as "incorporeal hereditaments" fall within the latter category.

Now, what is disclosed on the record touching the nature of this *hak* ?

The plaint claims it as "leviable upon the village Mouzah Kalam." The fair inference from the written statements of the respondent is, that the *hak* existed and was regularly paid by his father, as *Inámdár*, up to the year 1857-58. The question raised by these statements, as to the right of the respondent and his father to discontinue the payments, is one to be determined, not upon the issue of limitation, but on the trial of the other issues settled in the cause. The evidence taken in the suit shows that the answer of Hukamatrái (the respondent's father) to a question addressed to him in 1856 by a native official, to the effect, whether there was any *Todá Girás* paid for the Maháráná of Amud on account of the village of Kalam, was, "there are payable 501 Broach rupees for the *Todá* of the said Rana"; that the same Hukamatrái described the money paid by him on account of this *hak*, in his deposition of the 6th of November, 1861, as "the money on account of *Todá Girás* leviable upon my *Inám* village of Kalam," and, in his deposition of the 4th of April 1862, as "the annual amount of *Todá Girás* of my

village of Monzah Kalam ;” and further, that the payments made were made out of the revenues of the village, and were so entered in the village accounts.

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Taking this as the fair result of the evidence, and considering what has been ruled touching *Todá Girás haks* in the case of *Sumbhoolall v. The Collector of Surat* (i), and other decided cases, their Lordships are of opinion that, whatever may have been the origin of the *hak*, it must be assumed to be now a right to receive an annual payment which has a legal foundation, and of which the enjoyment is hereditary ; and that the liability to make the payment is not personal to the respondent, but one which attaches to the *Inámdár* into whosoever hands the village may pass ; or, in other words, that the *hak* is payable by the *Inámdár* *virtute tenuræ*. This being so, their Lordships have come to the conclusion that the interest of the *hakdár* does possess the qualities both of immobility, and of indefinite duration in a degree which, if the question depended on English law, would entitle it to the character of a freehold interest in or issuing out of real property (see 1 Cruise's Digest, p. 47, plac. 10) ; that upon the general principles of construction applicable to an Indian Statute, it must be held to be “an interest in immovable property” within the meaning of Act XIV. of 1859 ; and, accordingly, that the suit, having been brought within twelve years after the date of the last payment, can be maintained.

This being their Lordships' conclusion on the first and principal question argued, it is unnecessary for them to consider the second, viz. :—Whether, upon the principles enunciated and enforced in such cases as *The Dean and Chapter of Ely v. Cash* (j), *Grant v. Ellis* (k), and *Owen v. De Beauvoir* (l), it ought to be held that, inasmuch as Act XIV. of 1859 contains no express words to bar the right as well as the remedy, that statute can have any effect on the appellant's claim, except that of preventing him from recovering

(i) 8 Moo. Ind. App. 1.

(j) 15 M. and W. 617.

(k) 9 M. and W. 113.

(l) 16 M and W. 547 ; 5 Exch. 166.

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more than the arrears for the six years next preceding the institution of the suit. Their Lordships abstain from the consideration of this question the more willingly because it was never raised in the Courts below ; because the pleadings in the suit, which is brought to establish the right as well as to recover the arrears, assumes that the whole claim is subject to the law of limitation ; because there seems to be a considerable body of Indian authorities which support that assumption ; and because the limitation, applicable to claims to establish rights, will, at no distant date, have to be determined by the more carefully-drawn Statute of Limitation of 1871, which is soon to supersede that of 1859.

On this appeal their Lordships will humbly advise Her Majesty to reverse the decrees under appeal ; to declare that the appellant's suit is not barred by the Statute of Limitations, but was brought within time ; and to remand the cause for trial on its merits. Their Lordships think that the appellant ought to have the costs of this appeal. The costs incurred in India by reason of the trial of the second issue, should be dealt with by the Bombay High Court in the usual way on the final determination of the cause ; the appellant receiving back the costs (if any) which he may have paid under any of the decrees reversed.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 451 of 1872.*1873.
June 27.MAKTUM VALAD MOHIDIN *Appellant.*IMA'M VALAD MOHIDIN *Respondent.**Res Judicata—Sec. 2 of Act VIII. of 1859.*

If the plaintiff's present cause of action might and ought properly to have been made a ground of defence in a former suit, brought against him by the defendant, his suit is barred by Section 2 of Act VIII. of 1859.

The father of A and B having died, A, alleging that his father's assets amounted in value to Rs. 12,000, and admitting that he (A) had received Rs. 1,000 part thereof, in 1866 sued B, whom he alleged to be in possession of the rest of the property, for Rs. 5,000 as the residue of A's share, and obtained a decree for a half share in immoveable property of their father of the value of about Rs. 700 and no more. In 1871 B sued A for a moiety of the Rs. 1,000, which A, in his suit in 1866, had admitted to be in his possession.

Held that such a suit could not be maintained, as the claim on which it was founded must be deemed a *res judicata* in A's suit in 1866.

THIS was a special appeal from the decision of M. B. Baker, Senior Assistant Judge, F. P., of Belgám, at Kaládgi, in Appeal No. 72 of 1872, confirming the decree of the Subordinate Judge of Bījápúr.

The facts of the case are briefly these :—

The special appellant, Maktum, and special respondent, Imám, are Muhamadan brothers. In 1864 Maktum sued Imám to recover a share of the family property or damages agreed to be given in a deed of partition, alleged to have been dated 1854, when the father of the parties was living. This suit was rejected, the partition deed set up not having been proved. In 1866 Imám sued Maktum for a moiety of the family property, moveable and immoveable, left by their father, to the amount of about Rs 12,000. He admitted being in possession of about Rs. 1,000, and claimed Rs. 5,000 the remainder of the moiety. In this suit Imám obtained a decree for half a share in a house and two shops, worth about Rs. 700, the rest of his claim was rejected. In the year 1871, the

1873. suit, which forms the subject of the present special appeal,
 MAKTUM was filed by Maktum against Imám. In this suit Maktum
 v. claimed to recover a moiety of the property, which Imám in
 IMÁM. his suit of 1864 admitted he had been in possession of, and a
 moiety of certain other property which Maktum alleged
 Imám had fraudulently concealed.

The Court of first instance held this suit barred. The Court of appeal held that the cause of action to the plaintiff, in his suit of 1864, was the same as in the present one, although the forms of the suits were different; the partition deed in the previous suit was not the cause of the action but the evidence of it. On this ground that Court also held the plaintiff's claim barred.

The special appeal was heard by WEST and PINHEY, JJ.

Shántárám Náráyan for the appellant.

Pándurang Balibhadra for the respondent.

WEST, J. :—We are of opinion that although the decision, arrived at by the Assistant Judge, cannot be supported on the ground upon which he has placed it, yet the suit was barred by the suit of 1866, in which the present defendant, Imám, was plaintiff with the present plaintiff, Maktum, as defendant. That suit was brought after the death of their father, which occurred in 1862. Imám admitted the possession of a portion of the family estate, but sought still more. If what he sought was more than he was entitled to, Maktum might have urged that fact as a ground of defence. Either Maktum did not urge it or it was not sustained, for the judgment awarded to Imám a portion of the property that he sought. Maktum now comes forward to claim a partition, in his favour, of a portion of the same family property, on the ground that Imám holds more than his share. This was a matter which existed, if at all, at the time when the former suit was brought in 1866. Maktum had an opportunity of bringing it before the Court, and having lost that opportunity cannot now rest a new suit upon it: *Newington v. Levy* (a). In answer to Imám's averment "You Maktum have an excess,"

(a) L. R. 6 C. P. 193.

he should have said "No; you Imám have an excess." The former decision implies that the excess was in the hands of Maktum, and he cannot now come forward on the ground that, instead of an excess, there was a deficiency. We, therefore, confirm the decree of the Court below with costs.

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Decree confirmed with costs.

[APPELLATE CRIMINAL JURISDICTION.]

REG. V. PREMJI BHAGVA'N.

July 3.

Cotton Frauds Act—Bombay Act IX. of 1863, Secs. 2 and 8—Fraudulent intent or knowledge.

To constitute the offence of offering adulterated cotton for compression under Sec. 8 of Bombay Act IX. of 1863, it is not necessary to prove that the accused had a fraudulent intention, or that he had knowledge of the cotton having been adulterated, or deteriorated, or mixed, as described in Sec. 2. of that Act.

THIS was an application for the exercise of the Court's extraordinary criminal jurisdiction. The accused Premji Bhagván was tried and convicted by the First Class Magistrate of Ahmadabad for the offence of offering adulterated cotton for compression, and sentenced to pay a fine of Rs. 25,

Bombay Act IX. of 1863, Sec. 2 :—Whoever adulterates or deteriorates cotton, by mixing therewith any seed, dirt, stones, or other foreign matter, or who fraudulently or dishonestly mixes cleaned and uncleaned cotton, commonly called cuppas, or cotton of different varieties in one bale, or who fraudulently or dishonestly, by exposing cotton to dew or by any other means, deceptively increases, or attempts to increase, the weight of the same, shall be punishable, on conviction, with imprisonment of either description for a term not exceeding twelve months, and shall also be liable to fine. All cotton so adulterated, or deteriorated, or fraudulently mixed, or deceptively increased in weight, and which has formed the subject of such a conviction, shall be confiscated.

Section 8 :—Any person offering for compression cotton adulterated, or deteriorated, or mixed, as described in Section 2, shall, on conviction, be liable to a fine not exceeding rupees one thousand, and all such cotton shall be confiscated.

1873. under Sec. 8 of Bombay Act IX. of 1863; and eight bales
 REG. of cotton of the value of about Rs. 1,500 were also ordered
 v. to be confiscated. An appeal was made against this deci-
 PREMJI sion to the District Magistrate who rejected the appeal.
 BHAGVA'N.

The application was heard by MELVILL and NA'NA'BHA'I
 HARIDA'S, JJ.

Shántārām Nārāyan in support of the application :—
 Sec. 2 of the Cotton Frauds Act should be so read as to
 insert the words “fraudulently or dishonestly” between
 the words “whoever” and “adulterates,” for fraud or dis-
 honesty must be the very essence of crime.

[MELVILL, J. :—The Legislature has apparently been careful
 in this Act to insert those words where they considered them
 to be necessary, and has abstained from doing so where they
 considered otherwise. There are other enactments in which
 simple possession of certain articles, without any dishonest
 intention or knowledge, is made an offence. For instance,
 the possession of more than a quarter Surat seer of opium,
 on which duty has not been paid, is made punishable under
 Regulation XXI. of 1827, even though the person in pos-
 session may not be proved to have been aware that the
 opium had been smuggled.*]

[NA'NA'BHA'I, J. :—We cannot insert in Sec. 2 words,
 which the Legislature has thought fit to omit from it.]

There is not even an attempt to prove fraud or criminal
 knowledge on the part of the accused.

PER CURIAM :—The Court considers that as the accused of-
 fered the cotton for compression, and as it was adulterated,
 as described in Sec. 2 of Bombay Act IX. of 1863, the
 accused was liable to the penalties laid down in Sec. 8 of
 the Act; and that it was not necessary for the prosecution to
 prove that the accused had a fraudulent intention, or that he
 knew that the cotton was either adulterated or deteriorated.

Petition Rejected.

* Note.—See, as to evidence of fraud required for a conviction under
 Sec. 2 of Act IX. of 1863, *Reg. v. Jivan Usman*, 3 Bom. H. C. Rep.
 Cr. Ca. 12:—Ed.

[APPELLATE CIVIL JURISDICTION.]

*Miscellaneous Special Appeal No. 24 of 1872.*1873.
July 7

NAGINDA'S DEVCHAND, Assignee of a decree
obtained by JAYACHAND and PARBHUDA'S. *Appellant.*

NA'THA' PITA'MBAR and another, heirs and
representatives of ASHA'RA'M *Respondents.*

*Decree—Execution—Sec. 11 of Act XXIII. of 1861—Reversal of a
Decree—Property to be restored how valued.*

A obtains possession of property under a decree, the decree is subsequently reversed :—

Held 1st, that A must restore the property itself, or its actual value as determined by evidence, and not the amount for which it may have been sold ; and 2ndly, under Sec. 11 of Act XXIII. of 1861, that a claim for its restoration need not be the subject of a separate suit, but may be enforced in a miscellaneous proceeding.*

THIS was a miscellaneous special appeal against the order of F. D. Melvill, Judge of the District of Ahmadabad, reversing the order of the Subordinate Judge of Borsad.

The facts of the case are as follows :—

Asharám obtained, on the 25th November 1867, a decree against Ráyachand, Jayachand, and Parbhudás, directing that Asharám should retain possession of certain bales of cotton yarn given him by Jayachand and Parbhudás, that he should get from these two persons some other similar bales, and that, in the event of the latter failing to deliver them, Asharám should satisfy his debt by a sale of the bales already in his possession, and from the three defendants personally. On appeal this decree was reversed, so far as it regarded Parbhudás and Jayachand, on the 24th February 1871. On the 23rd November following the High Court confirmed the decree of the Appellate Court.

* *Note.*—The representatives of the original parties come within the meaning of "parties" in Sec. 11 of Act XXIII. of 1861 (*Buddu Rámaiya v. Venkaiva*, 3 Madras High Court Reports 263).—Ed.

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In the meantime, Jayachand and Parbhudás having delivered the bales which they were directed to deliver by the decree of the Court of first instance, they were sold, and the proceeds paid to Ashárám ; but, on this decree being reversed by the Appellate Court's decree, they applied for the restoration of the bales or their value. This application is now prosecuted by the appellant Nagindás, to whom the two defendants, Jayachand and Parbhudás, have assigned the decree in their favour.

The application was opposed by Ashárám's representatives on the ground, *inter alia*, that in execution proceedings the right of the assignee, Nagindás, to a re-delivery of the bales or their value could not be inquired into, but must form the subject of a regular suit. This contention was overruled by the Subordinate Judge of Borsad, but allowed by the District Judge of Ahmadabad in appeal.

A special appeal having been preferred ; it was heard by MELVILL and WEST, JJ.

Shántarám Náráyan appeared for the special appellant.

Nagindás Tulsidás appeared for the special respondents.

PER CURIAM :—The Court thinks that Ashárám's representatives are bound to restore the property taken in execution or to pay the value thereof : and by the value must be understood the actual value of the property, at the date of the execution sale, as the same may be established by evidence and not the amount for which the property may have been actually sold. It is objected that the present claim cannot be enforced in a miscellaneous proceeding, but must be the subject of a separate suit ; but, looking to the provisions of Sec. 11 of Act XXIII. of 1861, the Court thinks that this objection cannot be maintained.

The Court reverses the order of the District Judge and restores that of the Court of first instance.

Costs of both appeals in this Court and the District Court on Ashárám's representatives.

Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

*Miscellaneous Special Appeal No. 6 of 1873.*1873.
July 7.

HANMANTRA'V KHANDERA'VAppellant.

BHAVA'NRA'V BA'JIRA'VRespondent.

Deshmukhi allowances—Life Interest—Liability to attachments.

As the holder for the time being of a *Deshmukhi Watan* (an hereditary office) has only a life interest in the allowances pertaining to that *Watan*, such allowances, accruing due subsequently to his death, cannot be attached as part of his estate.

THIS was a miscellaneous special appeal from the order of E. Cordeaux, Senior Assistant Judge of the District of Poona, at Sholápur, confirming an order of the Subordinate Judge of Bársi.

The facts of the case are these :—

The plaintiff sued the defendant, as his deceased father's representative, to recover a sum of money due to him upon an agreement entered into between Bájiráv and Khanderáv, the fathers, respectively, of the plaintiff and the defendant; and obtained a decree directing that the defendant should pay the amount due to the plaintiff, but that if the defendant should fail to do so, the plaintiff's claim should be satisfied from the estate of the defendant's deceased father, Khanderáv. In execution of this decree, the plaintiff attached certain *Deshmukhi* allowances, in the hands of the Collector, which had accrued due subsequently to Khanderáv's death. The defendant contended that the allowance was not liable to attachment under the Pensions Act (XXIII. of 1871). This contention was overruled by the Courts below and the attachment was allowed to continue.

The special appeal was heard by MELVILL and WEST, JJ.

Dhirajlál Mathurádás, Government Pleader, for the appellant.

Shántarám Náráyan and *Pándurang Balibhadra* for the respondent.

1873. **PER CURIAM** :—By the terms of the decree, the plaintiff is
HANMANTRÁV authorized, in the event of non-payment by Hanmantráv,
KHANDERÁV to take out execution against the estate of the deceased
v. Khanderáv. Under this decree, he has attached, in the
BHAVÁNRA'V hands of the Collector, allowances accruing due, subsequently
BA'JIRÁ'V. to Khanderáv's death, to Hanmantráv, the present holder
 of the *watan*. These allowances can, in no case, be held to be
 the property of the deceased Khanderáv who had only a life
 interest in the *watan**. It may be that the decree does not
 give to the plaintiff all to which he is entitled, or all which
 it was intended to give; but the Court cannot, in execution,
 look beyond the terms of the decree, and these terms do not
 authorize the attachment of the *watan*.



The orders of both Courts below are reversed, and the attachment ordered to be raised. Costs on Bhavánráv.

Order accordingly.

* See, Reg. XVI. of 1827, Sec. 20, cla. 1 and 2; *Kunialal v. Wivavarav*, Morris Part III. p. 4; *Krishnarav v. Rangrav* 4 Bom. H. C. Rep. 12, 13, A. C. J.; West and Bühler Bk. II., Cap. III., Sec. 4, Question 3, (p. 52).—Ed.

[APPELLATE CIVIL JURISDICTION.]

June 18.

Special Appeal No. 379 of 1872.

NASIR BIN ABDUL HABIB FAZAL. *Plaintiff and Appellant.*

DA'YA'BHA'I ITCHA'CHAND... *Defendant and Respondent.*

Banker and Customer—Principal and Agent—Limitation—Act XIV. of 1859, Sec. 1, cl. 9.

A deposited certain moneys with B, a banker, and drew against them, but not to the full extent; the residue was employed on A's account by B, according to an agreement between them.

Held that, besides the ordinary relation of banker and customer, there subsisted also between them that of principal and agent; that, therefore, the right of action arose at the time of demand. *Held* also that a three years' limitation applied under Act XIV, of 1859, Sec. 1, cl. 9.

THIS was a special appeal from the decision of W. H. 1873.
 Newnham, Acting Judge of the District of Surat, con-
 firming, in appeal, the decree of the First-Class Subordinate
 Judge of that place.

NASIR BIN
 ABDUL HABIB
 FAZAL
 v.
 DA'YA'BHA'I
 ITCHIA'CHAND.

The plaintiff in 1869 sued the defendant to recover Rs. 3,246-15-6, being the balance of various sums deposited, from time to time, with the latter in 1864-65, whereof a part had been since withdrawn. The written statement disclosed the fact that, in pursuance of an agreement entered into between the parties, the residue not drawn against had been employed by the defendant on account of the plaintiff in the purchase and sale of *hundis*, and that the profits arising therefrom had been credited to the account of the latter.

It was contended in the Court of first instance, on behalf of the plaintiff, that each item was a deposit within the meaning of Sec. 1, cl. 15, of Act XIV. of 1859, and, consequently, recoverable within thirty years. On the other hand, it was objected, on behalf of the defendant, that the relation between the parties was that of debtor and creditor merely; that, therefore, the cause of action arose at the time of deposit; and that, as more than three years had elapsed since then, the suit was barred under Act XIV. of 1859, Sec. 1, cl. 9. The defendant's objection was allowed by both the Lower Courts, and the claim was, therefore, rejected. The District Judge, however, remarked, on regular appeal, that, notwithstanding the decision of the Calcutta High Court in *Tarini Prasad Ghose v. Rám Krishna Banerjee* (a), he felt bound to apply the common law doctrine that the cause of action in respect of money lent accrues at the date of the loan, because that ruling had not been adopted by the High Court at Bombay in *Mulchand v. Girdhar* (b).

The special appeal was heard by MELVILL and WEST, JJ.

Leith (with him *Dhirajlál Mathurádás*, Government Pleader) for the special appellant:—The only point is with regard to limitation. In *Foley v. Hill* (c) Lord Brougham de-

(a) 6 Beng. L. R. 160. (b) 8 Bom. H. C. Rep. A.C. J. 6.

(c) 2 H. L. Ca. 28.

1873. scribes the position of a banker to be that of a debtor, but
 NASIR BIN adds that he may, in certain cases, make himself an agent or
 ABDUL HABIB trustee. Here the defendant, in his written statement,
 FARAL admits that he employed the moneys remaining in his hands
 v. DA'YA'BHA'I on account of the plaintiff by dealing in *hundis*, in pur-
 ITCHA'CHAND. suance of an agreement entered into between them, and that
 he credited the plaintiff with the profits arising therefrom.
 He is, therefore, clearly an agent. See also, with regard to
 the fiduciary character of the banker, the decision in *Lord*
Hollis's case (d), and the doubts expressed by Pollock,
 C. B., in *Pott v. Olegg* (e).

If this be a case of money lent, the period of limitation
 would run from the date of the demand, which was made
 less than three years ago. In *Parbati Charan Mookerjee*
v. Ramnarayan Matilal (f), Macpherson, J., dissented from
 the English rulings, and followed them only because he
 considered himself bound to do so. In *Tarini Prasad*
Ghose v. Rám Krishna Banerjee (supra) the Court refused
 to extend to the Courts of the Mofussil the English doctrine
 that the cause of action arises at the date of the loan. Fur-
 thermore, in *Brammayi Dasi v. Abhai Charan Choudhry* (g),
 Norman, Acting C.J., held that a demand was necessary by
 Hindu law.

Macpherson (with him *Shántarám Náráyan*) for the
 special respondent:—The Lower Courts have found upon
 the evidence that the relation between the parties to the
 suit was that of banker and customer. This is not a case of
 agency at all, and no agency was set up till now. It is
 clearly a case to which, under Sec. 1, cl. 9, of Act XIV. of
 1859, a limitation of three years applies from the cause of
 action which arose, not from the date of demand, but from
 the date of the loan. The judgments of the Lower Courts
 must, therefore, be upheld.

(d) 2 Ventr. 345.

(e) 16 M. & W.

(f) 5 Beng. L. R. 396.

(g) 7 *Ibid* 489.

WEST, J.:—The suit in this case was brought for the recovery of a balance alleged to be due by the defendant to the plaintiff, on account of moneys deposited and partly drawn against, leaving a residue still owing to the plaintiff. The plaintiff claimed as a depositor in trust. The defendant replied that he must be treated as a mere borrower, and that, viewed in this light, his liability was barred by limitation, the last sum placed with him having, according to the plaintiff's own statement, been paid in more than three years before the institution of the suit. The Courts below held this plea a bar to the prosecution of the suit, and decreed against the claim.

An examination of the statements made by the parties shows that the plaintiff, in the first instance, intended to rely on his character as a depositor to bring himself within the clause of the Limitation Act, which allows 30 years for the institution of a suit against a depositary, counted from the time of the deposit. To this character, we do not think he is entitled. The relation of a depositor (in the popular use of that word) to a banker is conclusively settled by the case of *Foley v. Hill (supra)* to be that of a lender to a borrower. There is, in ordinary cases, no trust to prevent the banker's dealing with the money for the purposes of his own business. The depositor cannot even sue for an account. He knows, as well as the banker, what has been paid in and drawn out, and there is no fiduciary relation imposing a special duty on the latter.

If strictness of pleading, therefore, were not properly to be subordinated, in this country, to the ascertainment of the truth, and the furtherance of substantial justice, a question would arise of whether the plaintiff was not, upon the case, made by himself, deprived of the remedy accorded only to those lenders of money who take proceedings within three years of the loan or its acknowledgment. The District Judge, in upholding the decision arrived at by the Subordinate Judge, has considered himself bound by the English cases, and by that of *Mulchand v. Girdhar (h)*, in this Court,

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1873. to reckon the time for limitation from the date of each deposit; and, in determining whether this view were correct, we should have to estimate the force of the reasons assigned for and against the English rule, that a cause of action arises immediately out of a debt without a demand made for its payment, in the discussions of the question contained in the cases cited before us from the Bengal Law Reports. In the view we take of the present case, such an investigation becomes unnecessary; and we will only suggest that the explanation of the apparent injustice of allowing an action for a debt that had never been claimed, is to be found in the peculiar history of the action of *assumpsit*, which, being one of a class first devised for wrongs, was gradually allowed to supersede the old common law action of debt in cases of contract.

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Fortunately, we are not obliged to sacrifice the end to the means. "The substance and merits of the case," as observed by L. J. Knight Bruce in the case of *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (i), "are to be kept constantly in view. The substance, and not the mere literal wording of the issues, is to be regarded." And when we read the defendant's statements along with those of the plaintiff in this case, we cannot doubt that, besides the ordinary relation of banker and customer, there subsisted between them that also of principal and agent. The defendant was to employ the money, deposited with him, on the plaintiff's account, and, of course, therefore, at his risk by dealing in *hundis*. For any moneys thus realized, the defendant would plainly be liable to the plaintiff. What amounts had been gained or lost on the transactions entered into, could be known for certain only to the defendant. Under such circumstances, the plaintiff would have a right to claim an account, and this right would not be affected by the fact that some of the items in such account would probably, or even certainly by themselves, be of the class of those arising in the usual way between a banker and his

(i) 6 Moo. Ind. App. 410

customer. The case of *Topham v. Braddick (j)*, which has frequently been relied on in more recent cases, establishes clearly that where such a relation and such a right subsist, "a demand must be either proved or presumed in order to give the plaintiff a cause of action." The demand, in this case, was made, as the District Judge says, and the consequent right of action arose within three years before the institution of the suit. The claim was not barred, and the decrees of the Courts below, on that point, being reversed, the cause must be remanded for retrial on its merits.

Costs to follow the final decision.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 95 of 1873.

RA'MCHANDRA BHIKA'JI.....Appellant. July 21.
THE COLLECTOR OF RATNAGIRIRespondent.

Jurisdiction of Small Cause Court —Special Appeal—Sec. 27 of Act XXIII. of 1861—Act XIV. of 1869, Sec. 32.

A suit to recover less than Rs. 500, levied as assessment by Government officials, is cognizable by a Court of Small Causes; and, therefore, under Sec. 27 of Act XXIII. of 1861, no special appeal lies.

District Judges should, ordinarily, try such suits when brought in the District Court, and should not delegate the trial to their Assistants.

THIS was a special appeal from the decision of H. Birdwood, Acting Judge of Ratnagiri, in appeal, affirming the decree of H. J. Parsons, Assistant Judge in the same place.

This action being against the Collector of Ratnagiri, in his official capacity, was instituted in the Court of the District Judge, under Sec. 32 of Act XIV. of 1869. The District Judge, however, referred it to the Assistant Judge for trial. Both the Courts having thrown out the plaintiff's claim, a special appeal was preferred to the High Court against the decree of the District Court in appeal.

(j) 1 Taunt. 572

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1873. The appeal was heard before WESTROPP, C.J., and NA'NA'-
 RA'MCHANDRA BHA'I HARIDA's, J.
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v.
 COLLECTOR OF RATNAGIRI. *Vishvanáth Náráyan Mandlik* for the appellant.

Dhirajlál Mathurádás, Government Pleader, for the Collector of Ratnagiri, took a preliminary objection that, under Sec. 27, Act XXIII. of 1861, no special appeal could lie in the present case. He cited Special Appeal 402 of 1872 decided by SARGENT and PINHEY, JJ., on the 19th July 1873.

WESTROPP, C.J.:—This is a suit to recover the assessment Rupee 1-1-6 (with interest), wrongfully, as the plaintiff avers, levied by the defendant, the Collector of Ratnagiri, from the plaintiff's land, under circumstances which it is unnecessary for the purposes of this judgment to state. The Government Pleader on behalf of the defendant objects, under Sec. 27 of Act XXIII. of 1861, that a special appeal does not lie in such a case, the suit being "of the nature cognizable in a Court of Small Causes" under Act XI. of 1865 (substituted by its 2nd and 50th sections for Act XLII. of 1860), and the damage or demand being under Rs. 500. Act XI. of 1865 contains no provision so extensive as Sec. 32 of Act XIV. of 1869, which prohibits Subordinate Judges from receiving or registering suits in which Government, or any officer of Government in his official capacity, is a defendant. The 9th and 10th sections of Act XI. of 1865, relate to suits against local Governments, the Government of India, or the Secretary of State only, and not to officers of Government. The only exception to the jurisdiction of Small Cause Courts, relating to Revenue Officers, is the 4th exception, contained in Sec. 6. It is as follows: "For any claim for the rent of land or other claim for which a suit may now (see Bombay Act II. of 1866, Sec. 2) be brought before a Revenue Officer unless, as regards arrears of rent for which such suit may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the local Government with jurisdiction over claims to such arrears." That clearly does not apply to such a case as the

present. We are unable, therefore, to say that this action, being brought to recover money alleged to have been received by the defendant to the use of the plaintiff, or damages in respect of an assessment alleged to have been wrongful, does not fall within the description given in the commencement of the 6th Section of "suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, &c., &c., or for damages when the debt, damage, or demand, does not exceed in amount or value the sum of Rs. 500."

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We must, therefore, dismiss this special appeal with costs, expressing, however, our opinion that it would be desirable that there should be a provision with regard to Courts of Small Causes similar to that in the Bombay Courts Act XIV. of 1869, Sec. 32, above mentioned; and, further, that we think that it would be a suitable exercise of the discretion vested in District Judges, that they themselves should, ordinarily, try such suits as this, when brought in the District Court, and not delegate them to their Assistants. We may mention here that, in Special Appeal 402 of 1872, which was an action by the present plaintiff against the Collector of Ratnagiri, in respect of moneys alleged to have been wrongfully levied by the latter from the former, in respect of the costs of boundary marks, the amount claimed being under Rs. 500, Sir C. SARGENT and PINHEY, JJ., held that a special appeal would not lie.

[APPELLATE CIVIL JURISDICTION.]

1873,
July 29.*Referred Case.*

DESA'LJI MANA'JI *Plaintiff.*
HEMADA'LLI IMA'M HAIDARBAKSHA *Defendant.*

Jurisdiction of a Mofussil Small Cause Court over an officer of Government—"Local Government"—Act XIV. of 1869, Secs. 1 and 9.

A suit, within the pecuniary and other limits prescribed for Courts of Small Causes, in which an officer of Government is a party, in his official capacity, may be entertained by a Court of Small Causes in the Mofussil.

The phrase "Local Government" used in Sec. 9, and defined in Sec. 1, of Act XI. of 1865 does not apply to the Collector of a District, but rather to the Governors, or Lieutenant-Governors of Presidencies, or Commissioners of Provinces.

THIS was a reference by the Judge of the Small Cause Court at Ahmadabad, submitting for the decision of the High Court the question—

"Whether or not a suit is maintainable in a Mofussil Small Cause Court against a Government officer in his official capacity?"—

The Judge answered the question in the affirmative for the following reasons:—

"The defendant died after the suit was filed. The plaintiff has applied that the Collector, who has been appointed guardian of the deceased's son Musá Miyá, a minor, should be made a defendant.

"I have up to this time rejected suits against Government servants in their official capacity, thinking that such suits are maintainable in the District Court under Sec. 32 of Act XIV. of 1869. But now it appears to me that such suits are under the cognizance of a Mofussil Small Cause Court for the following reasons:—

"Sec. 9 of Act XI. of 1865, states that 'suits against the local Government, or against the Government of India, shall be brought in the Court having jurisdiction in the place

which is the seat of such Government;’ according to the interpretation given in Sec. 1 of the same Act, the Court means a Court constituted under this Act, i.e., a Mofussil Small Cause Court, and local Government denotes ‘the person authorized to administer the executive Government in such part.’ The Collector may come under the above definition, and his chief seat, Ahmadabad, is within the jurisdiction of this Court. If by the word ‘seat,’ the Presidency towns only are meant, then this section will have no meaning, as no Mofussil Small Cause Court has jurisdiction over the Presidency towns, there being Presidency Small Cause Courts constituted under another Act.

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“Sec. 32 of Act XIV. of 1869 can be reconciled with this view. The preamble to that Act states that it is for ‘the District and Subordinate Civil Courts in the presidency of Bombay.’ It gives the organization and jurisdiction of such Courts, but is silent as to Small Cause Courts. By Sec. 32 no Subordinate Judge, appointed under the Act, is to receive or register a suit in which Government or any officer of Government, in his official capacity, is a defendant. Such suits are to be instituted in the District Judge’s Court alone. No mention is made here about a Small Cause Court, nor is the provision regarding suits against local Government contained in the Small Cause Court Act repealed. By Sec. 12 of Act XI. of 1865, suits cognizable by a Small Cause Court are not to be heard by any other court having jurisdiction within the local limits. The Small Cause Courts have jurisdiction in particular cases, while Sec. 32 of Act XIV. of 1869 is general, and so it is applicable to those cases which do not come under the cognizance of a Small Cause Court.”

* * *

The reference was considered in Court by WESTROPP, C.J., and NA'NA'BHA'I HARIDA's, J., on the 29th July 1873.

WESTROPP, C.J.:—The High Court is far from certain that the question, submitted to it by the Judge of the Court of Small Causes at Ahmadabad, really arises in this case. It is

1873. . by no means clear that the Collector is sued in his character
 DESA'LJI of officer of Government. The Judge states that the Collector
 MANA'JI has been made a party to the suit, as guardian of a minor,
 v. under Act XX. of 1864, but the Judge does not specify
 HEMADA'LLI whether the Collector has been so appointed under Secs.
 IMA'M 3, 4, and 5, or under Sec. 11 of the Act. Possibly, if he
 HAIDAR- be appointed under Sec. 11 there may be a question
 BAKSHA. whether he should not be regarded as being sued as an officer
 of Government. However this may be, this Court does not,
 on the present occasion, object to express its concurrence in
 the opinion of the Judge, that a suit, (if within the pecuniary
 and the other limits prescribed for Courts of Small Causes,) in
 which an officer of Government is a party, may be entertained
 by a Court of Small Causes in the Mofussil, but this Court is
 not to be understood as adopting the reasoning upon which the
 Judge has arrived at that opinion. The Registrar has been
 requested by this Court to forward to the Judge a copy of the
 judgment of this Court delivered in *Rámchandra Bhikáji v. The Collector of Ratnagiri (a)*, in
 which this Court has briefly stated its reasons for holding that
 a suit, in which an officer of Government is a party, will lie in
 the Small Cause Court. With respect to Sec. 9 of Act XI. of
 1865, this Court, differing with the Judge, thinks that the
 phrase "Local Government," used there, and defined in Sec. 1
 of the same Act, does not apply to the Collector of a district,
 but rather to Governors, or Lieutenant-Governors of Presidencies,
 or Commissioners of provinces.

(a) Ante p. 305.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 171 of 1873.*1873.
August 26

DHARMA'JI VA'MAN and another *Appellants.*
 GURRA'V SHRINIVA'S and another *Respondents.*

Guardian and Ward—Compromise—Judicial Decision—Admission.

The transactions into which guardians enter on behalf of their wards, must secure to the latter some demonstrable advantage, or avert some obvious mischief, in order to obtain recognition in the Courts.

When parties enter into a compromise, or family arrangement, in order to avoid litigating the question, as to whether one of the parties is entitled to certain property or not, such compromise will not be set aside, although it should eventually turn out that the party taking something under the compromise was in reality legally entitled to nothing.

But where such a compromise was alleged to have been entered into by a mother, on behalf of two minor sons on the one hand, and an adult member of the family on the other, agreeing to give the latter more than had been awarded by a judicial decision, *it was held* that the compromise was not binding on the minors.

Apparent acquiescence in such a compromise by one of the minors after arriving at majority, though evidence against him, is not evidence of a conclusive character, when not continued for any considerable time.

THIS was a special appeal from the decision of M. B. Bakor, Acting Senior Assistant Judge at Kaladgi, in the Belgam District, amending the decree of the Subordinate Judge of Bijápur, who had awarded a part of the claim.

The facts of the case, in so far as they are material, sufficiently appear from the judgment of the Court.

The appeal was heard by MELVILL and WEST, JJ.

Dhirajlál Mathurádás, Government Pleader, for the appellants.

Shántarám Náráyan for the respondents.

Cur. adv. vult.

WEST, J. :—The defendants, in the present case, sued the plaintiffs during their minority for a portion of the *Watan*

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lands held by the latter. As to a part of their claim they succeeded, one *páv* equal to 30 *bighás* having been awarded to them; as to the remainder they failed. The decree to this effect was made in April 1863, and, in the latter part of that year, an application for execution was made, which, in January 1864, was rejected on the ground (an insufficient one as is admitted) of its not having been accompanied by a copy of the decree. Some negotiations for a settlement of the family dispute appear to have been meanwhile going on, the chief agent in which was Kalliánráv, the father-in-law of the plaintiff, Dharmáji, and the Assistant Judge has found that the land now in dispute was made over to the defendants in fulfilment of the private agreement thus arrived at. When precisely this agreement was concluded, or when it was carried out by a delivery of the two *pávs* of land, the Assistant Judge has not found. If the agreement was made in the month allowed for appeal subsequent to the decree obtained in April 1863, the presumption is strong that Dharmáji, the elder of the plaintiffs, against whom the decree had been obtained as a minor, was still in that condition. If the negotiation, as is irresistibly suggested by the application for execution, rejected in January 1864, had not been completed at that date, then the right of appeal had been lost by the present defendants through the lapse of time. As to the age of the plaintiff, Dharmáji, the Assistant Judge says, "Plaintiff admits that he is now (15th November 1872) 24 years of age it follows, therefore, that he was of age in 1864." From Dharmáji's statement that he was 24 years old in November 1872, it cannot be inferred that he was more than fifteen in the early part of 1864, and the Assistant Judge adopts the view that Dharmáji was a minor at the time of the agreement and transfer, by placing his obligation on the ground, not of the transaction having been originally binding on him, but of his ratification or adoption of it after he attained his majority by the receipts which he gave to the defendant, Gurráv, in 1866, 1867, and 1868. Clearly then the land was not made

over to the defendants as alleged by them, that is, after Dharmáji had come of age, and in virtue of an agreement which he himself carried into execution.

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It is unnecessary to insist on the special protection which the law gives to an infant. He cannot enter into a contract binding on himself except for necessities, cannot deprive himself of his estate so as to prevent his annulling the transaction when he comes of age. He who enters on the infant's estate will be made responsible as a bailiff or guardian, if not as a trespasser: *Wyllie v. Ellice* (a), *Blomfield v. Eyre* (b). Similarly, the Hindu Law invalidates a gift made by an infant donor (Vyav. May. Ch. 9 pl. 6). The appointment, and the powers and duties of guardians, are variously regulated by different systems of law. Where a father has died without making a provision on the subject, the English Courts ascribe to a mother a guardianship by nature until the infants attain their majority: *Mendes v. Mendes* (c). The Hindu law clothes her with a similar duty or privilege: *Ram Dhun Doss v. Ram Ruttun Dutt* (d), and she may, as guardian, act for the infant in settling the terms of a partition: *Nallapa Reddi v. Balammal* (e), *Lakshmibái v. Ganpat Morobá* (f). But just as under the English law, Lord Hardwicke in *Pierson v. Shore* (g) said, "If this indeed had been wantonly done by the guardian, without any real benefit to the infant, it would have been proper to come into a Court of Equity to be relieved against it," and limited the guardian's power to such acts as the infant, if of mature years, might reasonably have done; so in the case of *Temmaikal v. Subbammál* (h) and in many others under the Hindu law, the transactions, into which guardians enter on behalf of their wards, must, it has been held, secure to the latter some demonstrable advantage, or avert some obvious mischief in order to obtain recognition in the Courts. Instances of what may and of

(a) 6 Hare 505.

(c) 3 Atk. 624.

(e) 2 Mad. H. C. Rep. 182.

(g) 1 Atk. 481.

(b) 14 L. J. Ch. 260.

(d) 10 Calc. W. R. Civ. R. 425.

(f) 4 Bom H. C. Rep. O. C. J. 159.

(h) 2 Mad. H. C. Rep. 47.

1873. what may not be done will be found in *Bodh Mull v. Gouree Sunkur* (i), and *Baboo Kumola Pershad Narain Singh v. Nokh Lal Sahoo* (j).

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The question arises then: whether the arrangement entered into by the mother, Táibái, of the plaintiffs in this case, was so manifestly beneficial to her wards, and so governed on the part of those dealing with her by considerations of what was fair to the infants under her care as to be binding on the latter. The compromise of doubtful claims is a basis for binding engagements both at law and in equity; and for the settlement of family disputes especially, "it is clear that when parties enter into a compromise or family arrangement in order to avoid litigating the question as to whether one of the parties is entitled to certain property or not, such compromise will not be set aside, although it should eventually turn out that the party taking something under the compromise was, in reality, legally entitled to nothing:" *Thornbrough v. Baker* (k); and that the Courts will make many allowances in order to support any arrangement of this kind is shown by the leading case and several of the cases quoted in the notes to *Stapilton v. Stapilton* (l). Apparent inadequacy of consideration, for instance, has much less influence in such transactions than those of the ordinary kind: *Thornbrough v. Baker* (supra), *Howard v. Harris* (m). The intimate connexions of a Hindu family might warrant the extension of these principles to somewhat remoter relatives than under the English system; but the conditions, under which they are to be applied at all, are that the parties be on equal terms, the absence of imposition or undue pressure, and the existence of something to be compromised. A compromise, in good faith, of a claim wholly unfounded, is a good consideration for a promise: *Callisher v. Bischoffsheim* (n); but where this good faith does not exist "forbearance of an unfounded suit is no forbearance," as was said by Lord El-

(i) 6 Cal. W. Rep. Civ. R. 16.

(j) Ibid. 30.

(k) 2 White & Tud. 3rd Ed. 935.

(l) 2 Tud. L. C. 3rd Ed. 756.

(m) 2 White & Tud. 3rd Ed. 947.

(n) L. R. 5 Q. B. 449.

lenborough in *Jones v. Ashburnham* (o). If, therefore, the respective claims of the branches of the family in the present case, represented by Dharmáji and Gurráv, had been undetermined by judicial decision, it would have been an arrangement that the Courts should, by all means, support, if these two persons as adults had agreed to a division of the property between the respective branches. But, in fact, the dispute between them no longer related to a point that admitted of controversy. Gurráv had sued and obtained an award of a portion of what he had demanded. Thus the relative rights of the parties had been definitely settled. Even if Dharmáji himself, when affairs had been placed on this footing, had agreed to a compromise by which Gurráv was to obtain double of what the Court had awarded to him what consideration would there have been to support this resignation of an ascertained right? Gurráv says he intended to appeal, but an appeal was not open to him. The Assistant Judge has said that "further litigation might have taken place in the execution of the decree," but this further litigation, if any occurred, must obviously have been all to the disadvantage of the judgment-creditor, Gurráv, himself, and could form no ground for his receiving 60 *bighás* instead of 30. Whether, if Dharmáji being an adult had delivered the land to Gurráv, he could, in his own right, recover it back, may admit of question (see 1 *Cāmph* 136, 2 *Ev. Potth.* 406); but as he was a minor, he cannot be prejudiced by an act to which he could not validly consent. His mother, it is said, did consent, but what is the value of this? She was a woman, and as such regarded by the Hindu, as by the English law, as especially subject to imposition (*Vyav. M. Ch.* 1 S. II. pl. 10). She was a widow with her elder son close on his majority, and with a second son but three or four years younger. She had resisted the claim made by Gurráv throughout the lawsuit instituted by him. She could not then have thought his demand for twice as much as had been awarded to him a just one. It is inconceivable but that

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some undue influence must have been brought to bear in order to make her yield to it. She would probably have a claim to the interference of a Court of Equity, had she been dealing with her own property. How much stronger a claim have her sons whose property she affected to deal with? All the circumstances are wanting which could give efficacy as against them to so one-sided a transaction.

The Assistant Judge has considered, however, that the plaintiff Dharmáji has, by his conduct, since he came of age, adopted the compromise made on his behalf. It is no doubt the law, as shown by the cases already referred to, that the Courts will not interfere with a family settlement long acquiesced in. They will not, on a change of circumstances, upset an arrangement even between strangers, the benefit of which has been taken for many years by the party who seeks to overthrow the compromise. In the case of *Smith v. Low (p)*, the defendant had, as an infant, joined his mother in a lease of property belonging to him and his five brothers. Rent had been received from the lessee until ten years after the youngest of the family had come of age, that is, probably, for seventeen or eighteen years, at least, after the eldest brother had attained his majority. An action was then brought to eject the lessee, but Lord Hardwicke on a bill brought in equity established the lease. So in *Cole v. Gibbons (q)*, a subsequent confirmation, without fraud or surprise, of a bargain that could not itself be enforced, was held by Lord Talbot to give it validity. But then, as observed in a note to this case, the party confirming must be fully apprized of his right to be relieved against the original transaction. The same principle seems to be involved in *Walker v. Symonds (r)*. Where a plaintiff had not been aware of his right to eject, he was allowed to proceed though he had received rent for twenty years after coming of age under an invalid lease made during his nonage by his guardian: *Hicks v. Morant (s)*. What effect, then, are we, guided by those principles, to ascribe to

(p) 1 Atk. 489.

(q) 3 P. Wms. 289.

(r) 3 Swanst. 69.

(s) 2 Dow & Cl. 414.

the receipts which the Assistant Judge has construed as a "ratification of the conveyance" to Gurráv? The receipts are for contributions by Gurráv of a portion of the *Judi* or reduced assessment of the *Watan* proportional to the part made over to him. They do not, as in the English cases, in which the payment and receipts of rent have been held a binding acknowledgment of tenancy, imply any relation of landlord and tenant as subsisting between the parties. Gurráv has insisted on his proprietary right, and in that right has obtained possession of the land. His payments to Dharmáji were made, because, as the whole *Watan* was entered in the name of the latter as representing the principal branch, he alone could settle directly with Government for its demand, though, on his failure, the amount due might be realized from Gurráv or any other actual holder of the land (Reg. XVII. of 1827^o Sec. 5, cl. 2). Dharmáji received no improved rent from Gurráv; so that there was here no taking of a benefit under a contract which the taker afterwards seeks to repudiate when it has become burdensome. He was substantially a mere agent in passing on from Gurráv to the Government a payment inseparably attached to the enjoyment of the land.

Still, however, these documents, or at least two of them, do contain admissions, that the *Watan* land occupied by Gurráv had been given to him as having fallen to his share. If, then, the admissions had been so often repeated and over so long a period as in the case of *Smith v. Low* (*supra*), or for any considerable time after Dharmáji had attained complete maturity of understanding, we should have felt bound not to disturb an arrangement which, however indefensible at its inception, had been so recognized and adopted by the party who might have called it in question. But the receipts were really given by a boy of from sixteen to nineteen years of age. The very form of them, carefully moulded into an assurance of Gurráv's right, suggests the operation of his mind rather than of Dharmáji's only in drawing them up. Dharmáji cannot, indeed, be relieved from

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their operating as evidence against him, but they do not act as estoppels or with the conclusive effect which the Assistant Judge has ascribed to them. The land had been made over to Gurráv; in a sense, it had fallen to his share. A boy of sixteen might probably suppose that the arrangement had been justly and properly made, but there is nothing to indicate that, after being fully aware of his legal position in relation to Gurráv, he deliberately accepted that arrangement. There is nothing to show that he knew he was entitled to relief in equity against the agreement entered into by his mother during his minority. Thus viewed, his admissions, though undoubtedly evidence against him, are not evidence of a conclusive character. They do not, under the circumstances, make that a binding compromise which was ineffectual before. Equity extends its aid after the attainment of their majority to those who, as infants, had become involved in transactions that would injure them, (a) and this appears to be a proper case for the exercise of such a jurisdiction.

So far, therefore, as the agreement, under which Gurráv holds the sixty *bighás* of land, extends beyond the Court's award to him in 1863 of thirty *bighás*, we think it cannot be sustained. This appears to have been the view of the Subordinate Judge, who tried the present case in the Court of first instance, and his decree must be restored. The agreement will thus be made to give effect to the rights of the parties as clearly ascertained. For more than this, Gurráv could not effectively stipulate, and Táibái, as a guardian, could concede no more.

The view we have taken of this case, as between Dharmáji and Gurráv, makes it unnecessary to enter on a discussion of Devráv's liability or non-liability for the acts of his brother. We will say no more than that, even while he may bind himself, the managing member of a Hindu family cannot, by plainly improvident and groundless admissions, transfer the patrimony of his brothers gratuitously to a stranger; nor will the Court lend its aid to such transactions, essentially

opposed, as they are, to the first principles of equity, whatever technical form they may assume.

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The decree of the Assistant Judge is reversed and that of the Subordinate Judge restored. Costs on respondents.

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 34 of 1873.

August 19:

PREMA'BHA'I HEMA'BHA'I and others *Appellants.*

T. H. BROWN *Respondent.*

*Principal and Agent—Extent of Authority—Known limit—
Divisibility of Claim.*

A firm of carriers authorize one of their partners to draw bills on the firm to the extent of Rs. 200 each. The partner, acting in excess of his authority, and without the knowledge of the firm, made two promissory notes, in the name of the firm, for Rs. 1,000 each. The plaintiff knew the partner was limited to a particular sum, but also knew that two of his bills for Rs. 300 each had been previously accepted by the firm. In an action on the notes :—

Held, 1st, that the firm was not liable for the whole amount drawn; and 2ndly, that the contract, whereon the action was founded, was not capable of division, and, therefore, the firm was not liable to the extent of Rs. 200.

THIS was a special appeal from the decision of F. D. Melvill, District Judge of Ahmadabad, affirming the decree of the Second-Class Subordinate Judge of the same place.

The action was brought by T. H. Brown, as indorsee of two promissory notes, drawn by T. D. Hewett, in the name of Hewett and Co. of Ahmadabad, for Rs. 1,000 each. The plaintiff sought to recover the amount from the members of the firm of Hewett and Co.

The defendants pleaded that Hewett had no authority to draw the notes, or incur any debts on account of the firm

1873. and denied there liability to pay the plaintiff's claim. Both
 PREMA'BHA'I the Lower Courts held the notes binding on the firm, and
 HEMA'BHA'I awarded the plaintiff's claim. The following extract from
 v
 T. H. BROWN. the District Judge's judgment will show his reasons for the
 decision :—

“Mr. Hewett was a partner in the firm of Hewett and Co. The firm was formed for the purpose of carrying on a kind of carting agency at the Ahmadabad Railway Station. Differences, however, arose between the firm and the Railway Company, and Mr. Hewett was sent to England in order to obtain a removal of the difficulties and obstructions encountered by the firm. While in England, he, undoubtedly, transacted business on account of the firm, and he drew bills on the firm which were honoured in this country. Finally, he made the promissory notes now sued on, signing them as ‘Hewett and Co.’ But one conclusion seems possible from these facts, namely, that the firm is liable. Mr. Hewett was really and ostensibly a member of the firm, and transacting business in England for the firm. There was nothing unusual in the fact of his requiring money for necessary expenses, and, as a matter of fact, other bills, which he had drawn, had been honoured. In the absence, then, of any notice to the public, that any restriction had been placed on Mr. Hewett's authority, persons with whom he had dealings were entitled to look upon him as representing the firm, and as having full authority to bind all the partners. There was nothing in the amounts drawn on the promissory notes now sued on, which would show that he must be necessarily exceeding his authority.”

In special appeal one of the grounds urged was that Mr. Hewett having been deputed to England as an agent of the firm, to do a particular thing, strictly defined in an agreement made with him by the firm, and no power to borrow money or make promissory notes having been expressly given therein, or being necessary or incidental to the doing of that thing, the Lower Court was wrong in holding his principals in Ahmadabad bound by such notes made by him

in England, not only without any authority, but in opposition to their express instructions.

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The special appeal was argued before MELVILL and PINHEY, JJ.

Dhīrajīlāl Mathurādās for the appellants :—The Managing Agent of a non-trading partnership, such as a carting agency, has no implied authority to bind his partners by bills or promissory notes. Express authority must be carried out literally.

Vāsudev Jaganāth and *Pāndurang Balibhadra* for the respondent.

Ireland v. Livingston (a) and *Arlāpā Nāyak v. Narsi Keshavji & Co., (b)* were referred to.

MELVILL, J. :—The plaintiff in this case sues as the indorsee of two promissory notes, each for £100, dated, respectively, the 10th and 15th September 1869, and made by T. D. Hewett, in the name of Hewett and Co. of Ahmadabad.

At the time when he made these notes, Hewett was in England, engaged in certain negotiations in the interest of the Ahmadabad firm; and in the agreement executed to him by the firm, he is described as “the managing member of Messrs. Hewett & Co.,” and as having “agreed to proceed to England for the business of Messrs. Hewett & Co.”

Under these circumstances, we should probably have no difficulty in holding that Hewett had an implied authority to bind his firm by raising a loan: *Rothwell v. Humphreys (c)*, *Thicknesse v. Bromilow (d)*, *Brown v. Kidger (e)*. But the question whether he had authority to draw a bill on the firm, or to make a promissory note in the name of the firm, depends upon special considerations arising out of the peculiar incidents of such negotiable securities.

It is clear that one partner of a partnership *in trade*, has an implied authority to bind the firm by drawing a bill, or

(a) L. R. 5 Q. B. 516.

(b) 8 Bom. H. C. Rep. A. C. J. 22.

(c) 1 Esp. 405.

(d) 2 C. & J. 431.

(e) Hurl. & N. 853.

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giving a promissory note in the name of the firm ; but in the case of partnerships which are not of a mercantile character, there is no such implied authority. Thus, in the case of a mining company, *Dickinson v. Valpy* (f), or a farming company, *Greenslade v. Dower* (g), or a firm of attorneys, *Hedley v. Bainbridge* (h), a partner cannot bind the firm by a bill of exchange or a promissory note, unless he has express authority to draw or make it. In the present case, the firm of Hewett & Co. was certainly not an ordinary trading partnership. It was merely a carrying company, formed for the purpose of carting goods from the railway to the town of Ahmadabad, and the drawing and accepting of bills, or making of promissory notes, was in no way necessary for the purpose of carrying on the business of such a partnership. We must hold, therefore, that Hewett had no implied authority to make the notes on which the plaintiff sues.

Then had he an express authority ? The only authority shown in the case is a telegram, dated the 19th June 1869, which is in these terms—" Draw on Mayábhái " (one of the partners in the firm) " Rs. 200 each time." This is very vague, for the words do not in any way limit the number of bills for Rs. 200, which Hewett might have drawn. But they are sufficiently clear as to one point, viz., that the firm did not authorize Hewett to draw any single bill for a larger sum than Rs. 200. As Hewett had no general authority, arising from the nature of the partnership, to draw bills, it was incumbent upon any person taking his bills or notes to satisfy himself of the extent of his special authority ; and the plaintiff, in his evidence, says that the telegram authorizing Hewett to draw was shown to him. We feel constrained to hold that the special authority contained in the telegram limited Hewett to the drawing of single bills for Rs. 200, and vague though the telegram is, it is sufficiently explicit on this point to prevent the plaintiff from urging that he was misled into the belief that it authorized Hewett to draw for £100 at a time.

(f) 10 B. & C. 128. (g) 7 B. & C. 635.

(h) 3 Q. B. 316.

It remains to consider the finding of the District Judge, 1873.
 that, notwithstanding any want of authority on the part of PREMA'BHA'I
 Hewett, the plaintiff is entitled to succeed to the full extent HEMA'BHA'I
 of his demand, because other bills, which Hewett had drawn, v.
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 had been honoured by the firm. We think that this proposition is stated much too broadly. The principle, on which a principal may, in certain cases, be held bound by acts of his agent, in excess of the agent's authority, is that the principal has, by his words or conduct, induced a third person to believe that the agent's acts were within the scope of his authority. The plaintiff, in his evidence, says that he was aware that the firm had previously accepted two bills drawn upon them by Hewett for about Rs. 300 each. Was this circumstance sufficient to induce in him a belief that the firm had authorized Hewett to make notes for £100, in the face of the telegram, which he had seen, limiting Hewett to the drawing of bills of Rs. 200 only? It seems to us impossible to hold that it was sufficient. In *Morris v. Bethell* (i), the defendant had honoured three bills, which had been accepted in his name without his authority, and one of these bills had been held by the plaintiff himself; but it was held that he was not thereby estopped from dishonouring a fourth bill similarly drawn. It would be a very dangerous doctrine that a person, who honours two or three bills drawn upon him for an amount slightly in excess of that for which he has specially authorized his agent to draw, thereby holds out to the world that he will pay any promissory note which his agent may make.

On these grounds, we have arrived at the conclusion that the plaintiff's claim must be disallowed. We were at first inclined to think that he might recover to the extent specified in the telegram, viz., Rs. 200 on each note. But, on further consideration, and after referring to the decision of the Court of Exchequer in *Baines v. Erving* (j), which is a case very strongly in point, we think that we must treat the contract as not capable of division, and reject the plaintiff's claim in *toto*.

(i) L. R. 5 C. P. 47. (j) L. R. 1 Exch. 320.

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We reverse the decrees of the Courts below, so far as they affect the special appellants, and reject the claim against them.

Costs of special appellants in Court of first instance on plaintiff. Under the circumstances of the case, we order that each party pay his own costs in appeal and special appeal.

Decree reversed.

12R4 Bom/392.
12R4 Bom/392.
12R4 Bom/392.

[APPELLATE CIVIL JURISDICTION.]

August 28.

Special Appeal No. 242 of 1873.

NA'RA'YAN VISA'JI *Appellant.*

LAKSHU'MAN BA'PUJI and others *Respondents.*

Landlord and Tenant—Yearly Tenancy—Mirásdár—Inámdár—Khot—Custom of the Country—Perpetual and hereditary occupancy—Ejectment.

The defendants entered on land as tenants of a *Mirásdár* on terms which they could not prove, but held it at a uniform rent for three generations and for more than fifty years.

Held, that the defendants, in the absence of any special agreement to the contrary, had not acquired by prescription a right of permanent tenancy.

Whatever right of permanent tenancy a tenant may, by prescription, acquire as against an *Inámdár*, or a *Khot*, it would be contrary to the custom of the country and to the nature of *mirás* tenure, to hold that he could acquire such a right as against a *Mirásdár*.

THIS was a special appeal from the decision of S. Hammick, Assistant Judge at Poona, reversing the decree of the Subordinate Judge of Kheda.

Naráyan Visáji brought this suit to recover possession of certain land from Lakshúman, son of Bápúji, and from Sakhárám and Máhádú, sons of Sankroji. The land was originally the *mirás* property of Bhikáji Rámchandra, and cultivated, on payment of rent, by an ancestor of Sakhárám and Máhádú. In 1826, Bhikáji mortgaged the land to

Bápúji (father of the defendant Lakshúman). Bhikáji having subsequently died, without any issue, the *Inámdár* in 1869 sold the land to the plaintiff as his *mirás* property.

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The defendant Lakshúman stated that the land had been mortgaged to him by Bhikáji Rámchandra, who alone had the power to redeem it. He also set up his mortgage lien on the land. The other defendants pleaded permanent tenancy, and stated that, as they had occupied the land for more than fifty years, they could not be ousted.

The Subordinate Judge found that the land had been mortgaged to the defendant Lakshúman Bápúji by the original *Mirásdár*, and held the plaintiff entitled to redeem it on payment of Rs. 800 to Lakshúman, and to recover possession thereof from the other defendants.

In appeal, the Assistant Judge reversed the decree, and held Sakhárám and Múhádú to be permanent tenants, entitled to occupy the land on payment of rent.

In special appeal, the plaintiff, among other objections, urged that the Lower Court, in the absence of evidence that the respondents were perpetual tenants, ought to have held them to be tenants from year to year.

The special appeal was argued before MELVILL and PINHEY, JJ., on the 28th August 1873.

Bahiravnáth Mangesh for the appellant.

Janárdhan Sakhárám, contra.

MELVILL, J. :—The respondents admit that they entered as tenants of a *Mirásdár*, whose rights have lapsed to the *Inámdár* of the village, and have been by him conveyed to the plaintiff in this suit.

The respondents cannot prove the terms on which they entered; but it is admitted that they have held for three generations and for more than fifty years. It is contended that this long enjoyment is sufficient to create a legal presumption that the original lease conferred a perpetual and hereditary right of occupancy, and that, at any rate, having

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held so long, they cannot, according to the custom of the country, be ejected, so long as they pay such reasonable rent as may be demanded of them.

It has been repeatedly decided by this Court that occupation by a tenant for a number of years does not create a presumption that the land was originally demised on a perpetual lease. The decision in *Annújt A'ppáji v. Kási A'tnáji* (a) appears to tend to a different conclusion; but that it does not really do so is apparent from the observations made by one of the learned Judges who decided it in a subsequent case: 8 *Endar Lálú v. Lallu* (b). The respondents, having admitted that they entered as tenants, and not having proved any special agreement to the contrary, must be presumed to have entered as tenants from year to year.

As regards the custom of the country, there is, no doubt, some authority for holding that, as against an *Inámdár* or a *Khot*, a tenant may, by length of occupancy, acquire a right of permanent tenancy. But the landlord in the present case is a *Mirásdár*; and, undoubtedly, according to the custom of the country, a *Mirásdár* would have a right to eject any other occupant from his land, even after a longer period than that for which the respondents are proved to have held. This would be the case even if such occupant had entered adversely to the *Mirásdár*; and *a fortiori* would it be the case when he had entered as his tenant. It seems to us that a decision that the tenant of a *Mirásdár* may, by prescription, acquire *mirás* rights against his landlord, would be directly opposed to the custom of the country and to the nature of the *mirás* tenure.

We are, therefore, of opinion that the decree of the Assistant Judge must be reversed, and that of the Subordinate Judge restored. The special respondents must bear the costs in the regular appeal; but, under the circumstances of the case, we order that each party bear his own costs in special appeal.

(a) 3 Bom. H. C. Rep. A. C. J. 124. (b) 7 Idem. 111.

11280-1253

[APPELLATE INSOLVENT JURISDICTION.]

IN RE DHANJIBHA'Í KHARSETJI RATNA'GAR and another.

1873.
August 21.

Insolvency—Assignment to trustees for benefit of creditors—Voluntary assignment—Pressure—Indian Insolvent Debtors' Act—Stat. 11 & 12 Vict., ch. XXI., s. 24.

Where two insolvent partners, being sued by two of their creditors, and urgently pressed by others, called a meeting of their creditors to consult them as to the course to be adopted, and the creditors at such meeting resolved that the affairs of the insolvents should be wound up, under a deed of assignment in trust for the benefit of their creditors, and, in pursuance of this resolution, (which was not shown to have been proposed by or to have originated with the insolvents,) a deed of composition was drawn up and executed by the insolvents, whereby they assigned their entire property to trustees for the benefit of all their creditors who, before a certain specified time, should sign the deed;

It was held that, under these circumstances, the composition deed could not be considered a voluntary assignment within the meaning of Sec. 24 of the Indian Insolvent Debtors' Act, and the deed was accordingly upheld. The onus of proving an assignment to be voluntary within the meaning of the above section lies upon the person impugning it.

Whether one of the creditors of an insolvent, without the consent, or without using the name, of the Official Assignee, can take steps in the Insolvent Court with a view to have an assignment by an insolvent to trustees set aside as voluntary.—*Quære.*

THIS was an appeal from an order made by PINHEY, J., as Commissioner in the Insolvent Court, discharging with costs an order made by BAYLEY, J., *ex parte* on the application of Jamsetji Ratnagar, an opposing creditor of the insolvents, whereby it was ordered, under Sec. 26 of the Statute 11 and 12 Vict., c. 21, that Fardunji Framji and two others (Trustees of a deed of composition, dated the 16th of December 1872, executed by the insolvents and their partner in favour of all their creditors who, within three calendar months, should execute the same,) should hold and retain all property belonging to the insolvents in their power or control, and all the proceeds thereof until the Insolvency Court should make further order concerning the same. The following is a brief resumé of the facts of the

1873. case: their effect is fully stated in the judgment of the
DHANJIBHA'I Court.
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The insolvents were merchants carrying on business in partnership, both in Bombay and in China. They became involved in difficulties towards the end of 1872, and on the 26th of November of that year a meeting of their creditors was convened, but no definite steps were then taken. After the meeting several of their creditors pressed the insolvents much for payment of their claims, and two of such creditors (one of them being the opposing creditor and the applicant in the present proceedings) filed suits in the High Court against the insolvents. The latter were, therefore, compelled again to call a meeting of their creditors which they did. This creditors' meeting took place on the 14th of December 1872, and at it a resolution was passed to wind up the affairs of the insolvents by a private trust deed, and three persons were appointed trustees for the purpose, namely, Fardunji Framji Colah, Keshavji Devji, and Mohanji Manikehand. In pursuance of the above resolution a trust deed was prepared, and the same was executed by the insolvents on the 16th of December. The trust deed conveyed the whole property of the insolvents to the trustees who had been appointed at the creditors' meeting in trust for the benefit of all the creditors of the insolvents who should come in and sign the deed within three months from the date of its execution. All the creditors of the insolvents, including the opposing creditor and the other creditor who had filed suits against the insolvents, had due notice of, but the latter two creditors did not attend the meeting. A large proportion of the other creditors attended it.

On the 23rd of December the solicitors of the trustees wrote to the creditors who had filed suits against the insolvents, asking them to withdraw the suits and come in and sign the composition deed, informing them that the time for doing so would expire upon the 17th of March 1873; but, notwithstanding such notice, the creditors proceeded

with their suits, and the insolvents, in consequence, on the 13th of January 1873, filed their petition and schedule in the Insolvent Court. On the next day the opposing creditor obtained a decree against the insolvents, but, in consequence of their having filed their petition and schedule in the Insolvent Court, the execution of the decree was stayed. Subsequently, the opposing creditor obtained in the Insolvent Court the injunction against the trustees from the order discharging which the present appeal was presented.

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Starling (with him the Honourable A. R. Scoble, Advocate General,) for the opposing creditor and appellant, contended that the composition deed in this case not having been made for the benefit of all the creditors, but for the benefit of those only who should come in and sign it to the exclusion of the rest, was void: *Irving v. Gray* (a). Though that case was decided upon the English Statute of 1849, it only embodied the general principle that such deeds are only valid against not assenting creditors when they are for the benefit of all the creditors. The cases of *Fisher v. Bell* (b), *Tetley v. Taylor* (c), and *Ex-parte Morgan* (d), show the manner in which the Courts apply this principle. See also *Bloomer v. Darke* (e), and *Larpent v. Bibby* (f). There is no clause in the present composition deed in express terms excluding any of the creditors; but the trust being for those who sign before a particular day, some of the creditors are partially excluded from its benefit. See 1 Story Eq. Jur. S. 370 and S. 1036. As to the effect of the creditors not coming to sign or expressing their assent to the deed before the insolvency, see *Ilderton v. Castrique* (g), *Ilderton v. Jewell* (h), *Ex-parte Morgan* (i), *Ex-parte Rawlings* (j), *Biron v. Mount* (k), *Benham v. Broadhurst* (l). Independently of this objection, the facts before the Court

(a) 3 H. & N. 34. (b) 12 C. B. 363. S. C. 21 L. J., C. P. 228

(c) 1 El. & Bl. 521. (d) 32 L. J. Bkpty 15.

(e) 2 C. B. N. S. 165. (f) 5 H. L. Ca. 481.

(g) 13 L. T., N. S. 506—B. C. (h) 33 L. J., N. S., C. P. 148, 151.

(i) 1 De G. Jo. & Smi. 288. (j) 1 De G. Jo. & Smi. 225.

(k) 24 Beav. 642. (l) 3 Hurl. & Colt. 472.

1873. show that this was a voluntary conveyance by the insolvent to the trustees, and that being so, it is void under Sec. 24 of the Indian Insolvent Act.

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Macpherson (with him *Marriott*) for the respondents argued that the cases cited were decided upon the English Bankruptcy Acts, which give to the deeds executed under their provisions a greater effect than deeds have here or had in England before those Acts were passed. Before their passing, such deeds did not prevent the non-executing creditors from suing the insolvent personally, though they did protect the assets in the hands of trustees: *Johnson v. Fesemeyer* (m), *Raworth v. Parker* (n) (in which case the deed was executed in 1853), *Whitmore v. Turguand* (o), where the deed was executed in 1861. For the law in Bombay, see *Bamanji Manikji v. Naoroji Palanji* (p), and *Bápuji Audit-rám v. Umedbhái* (q). Besides in England the mere fact of executing a composition deed is an act of bankruptcy. The affidavit of the insolvent, Dhanjibhái Kharsetji Ratnagar, shows that this conveyance was not voluntary, but that it was the result of pressure: *Mogg v. Baker* (r), *Eklwards v. Glyn* (s), *Johnson v. Fesemeyer* (t), *Strachan v. Barton* (u), approving of *Mogg v. Baker*; Story's Equity Jurisprudence 1030 a; *Norman v. Thompson* (v), *Pickstock v. Lyster* (w), shows that apart from the English Act such a deed of composition is good.

WESTROPP, C.J.:—This is an appeal against an order of the 2nd July last by Mr. Justice Pinhey in the Insolvent Court, discharging with costs a previous order of the 7th May last made under Sec. 26 of the Statute 11 and 12 Vict., c. 21, in that Court by Mr. Justice Bayley on an *ex-parte* application of the opposing creditor, Jamssetji Ratnagar, whereby it was ordered that Fardunji Framji Colah and two other

(m) 3 De G. & Jo. 13.

(n) 2 Kay & J. 163.

(o) 3 De G. F. & J. 107.

(p) 1 Bom. H. C. Rep. 233.

(q) 8 Bom. H. C. Rep. A. C. J. 245. (r) 4 M. & W. 348.

(s) 28 L. J. Q. B. 350.

(t) 3 De Gex. & Jo. 13, 24.

(u) 11 Exch. 647.

(v) 4 Exch. 755.

(w) 3 M. & S. 371.

gentlemen (trustees of a deed of composition, dated 16th December 1872, executed by certain traders, viz., the present insolvents and their partner, in favour of all of their creditors who, within three calendar months, should execute the same) should hold and retain all property belonging to the insolvents in their power or control, and all the proceeds thereof, until the Insolvency Court should make further order concerning the same.

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The contention of the creditor, Jamsetji Ratnagar, on which he obtained the *ex-parte* order of the 7th May, was that the deed of composition is fraudulent and void under the 24th section of the Indian Insolvent Debtors' Act, 11 and 12 Vict., c. 21. (His Lordship here read the section.) The burden of proof that the deed is fraudulent and void, rests upon the attacking party, the opposing creditor, who obtained the *ex-parte* order. In order to establish that proposition, it was necessary that he should convince the Court that the deed was voluntary, the words of the 24th section being "shall voluntarily convey," &c. That section declares that such voluntary conveyances, as are contemplated by it, shall be fraudulent and void "as against the assignees" of the insolvent. The only assignee in *Insolvency* of the present insolvents is the Official Assignee. Such an occurrence as an appointment of trade assignees under the Insolvent Debtors' Act rarely or ever happens in Bombay. The application to Mr. Justice Bayley was neither made by the Official Assignee, nor in his name, nor with his consent. That alone would seem to be a very formidable objection to it. The cases of *Harland v. Binks* (x), *Janes v. Whitbread* (y), and *Bamanji Manikji v. Naoroji* (z), may have some bearing on that point. It may be said that the Official Assignee might refuse to make or authorize such an application, and that then the creditor would be helpless. But this is not so. The Court would, in a proper case, and on the Official Assignee's being indemnified against costs, compel him to make the application, or to

(x) 15 Q. B. 713.

(y) 11 C. B. 406.

(z) 1 Bom. H. C. Rep. 233.

1873. lend his name for the purpose, in the same manner as it has
 DHANJIBHAI ordered him, on a former occasion, to take steps to set aside
 KHARSETJI a sale which there seemed reason to believe to be improper.
 RATNAGAR. We are very far, however, from desiring to intimate an
 opinion that the Official Assignee was wrong in standing aloof
 in the present case. Facts, which will be presently mentioned,
 would, most probably, have deterred the Court from placing
 any constraint upon him. It is, however, unnecessary for
 us now to decide whether the application ought to have been
 made by, or in the name of, the Official Assignee, inasmuch
 as we are of opinion that, even supposing that such an appli-
 cation might be made on behalf of a creditor, not being an
 assignee, the application, in this instance, ought not to have
 been successful, because the deed of composition was not
 as we think, voluntary. That deed was, it is true, executed
 within two months previously to the filing of the insolvents'
 petition in Insolvency, and when they were in insolvent
 circumstances, but, in order to come within the 24th section,
 it must also have been voluntarily executed; and that, as
 we think, it was not, when we look at the meaning of the
 word "voluntarily" as illustrated by the cases cited by Mr.
 Macpherson. If there were pressure for such a deed by cre-
 ditors, if, in fact, the demand for such a conveyance originated
 with the creditors, then those cases show that the conveyance
 will not be regarded as voluntary. Two creditors, the pre-
 sent opposing creditor and Pránjivandás Girdharlál, had,
 shortly before the execution of the deed, commenced suits
 against the insolvents; and other creditors had, as appears
 in the affidavit of the insolvent Dhanjibhái, demanded im-
 mediate payment of their debts, and the insolvents were
 unable to comply with those demands, and, under those
 circumstances, were constrained to convene a meeting of their
 creditors for the purpose of consulting them as to the best
 course to be pursued. There is not any evidence to show
 that, at that meeting, the proposition, that a deed of compo-
 sition should be executed, originated with the insolvents. It
 lay upon the opposing creditor, Jamsetji Ratnagar, to es-
 tablish that proposition. The deed of composition itself

says, "it was proposed," but does not say by whom. We are inclined to think that, if the proposition emanated from the insolvents, Jamsetji Ratnagar would have been prompt to say so in his affidavit. He says, indeed, that they called the meeting, and that certainly was so; and he adds that he believes, and is informed, that it was not "well attended," and that "most of the creditors present represented the friends and relatives of the said insolvents." He, however, although he had due notice that the meeting was to be held, was not present at it. The insolvent Dhanjibhai in his affidavit shows that the meeting was very well attended, i.e., by twenty-one out of the thirty-three creditors then known, who, as well as five other creditors not present at the meeting on the same day (14th December 1872), signified their wishes* that a deed of composition should be executed; and that those twenty-six creditors represented Rs. 1,03,573 of the then known liability, Rs. 1,27,525. The opposing creditor, Jamsetji Ratnagar, after describing the summoning of the meeting, as already mentioned, proceeded to state that "a resolution was passed to wind up the affairs of the said insolvents by a private trust deed, and three persons were appointed trustees for the purpose, viz., Fardunji Framji Colah, Keshavji Devji, and Mohanji Manikchand, and that, in pursuance of the said resolution, a trust deed was prepared and executed on the 16th day of December 1872." There is not one word in his affidavit to show that, although the meeting was convened by the insolvents, the trust deed was suggested by or originated with them. The word "resolution" indicates the action of the creditors; creditors, too, who, it must be recollected, had been just before pressing the insolvents with "immediate demands for payment," as stated by the insolvent Dhanjibhai in the following passage of his affidavit: "In consequence of the said Jamsetji Ratnagar and several of our creditors having made immediate demands upon us for payment of their debts, and we being unable to meet the same, we deemed it advisable, under the circumstances, to

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* Note.—As to what is a sufficient assent see L. R. 4 Exch. 197.—ED.

1873. leave our affairs in the hands of our creditors ; for this purpose, the meeting of the creditors, referred to in the 4th paragraph of Jamsetji Ratnagar's affidavit, was held, on the 14th day of December 1872, at the office of Messrs. Manisty and Fletcher ; the creditors, assembled at the said meeting, considered that it would be more advantageous to the interests of the general body of creditors if our affairs were liquidated under a private trust than through the instrumentality of the Insolvent Court. The application, which my co-partner, Peroshá Pestanji, and myself have made to the Honourable Court for the benefit of the Insolvent Act, was rendered necessary in order to protect our persons from arrest at the instance of the said Jamsetji Ratnagar and the firm of Pránjivandás Girdharlál, who, notwithstanding notice of the execution of the said trust deed, proceeded to judgment against us in the High Court in respect of their claims against us. The said firm of Pránjivandás Girdharlál has since come in under the said deed."

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The result of that passage is that the insolvents, being sued by two creditors, and urgently pressed by others, called a meeting of their creditors to consult them as to the course to be adopted. The creditors then assembled, probably influenced to a considerable extent by the fact that two creditors were suing the insolvents, and would, on obtaining judgments, sweep away an undue share of the assets, resolved that the affairs of the insolvents should be wound up under a deed of trust. There is not a word to the effect that the course, taken thus unanimously by the meeting, was suggested or proposed by, or on behalf of, the insolvents. It lay, as we have said, upon Jamsetji Ratnagar to prove that the deed was voluntary, *i.e.*, that it emanated from the insolvents, and, in our opinion, he has failed so to do.

This certainly is not a case in which we should be disposed to rest satisfied with conjecture, or slight indications of a probability that the deed originated with the insol-

vents, or to aid a creditor impeaching the deed under such circumstances, as Jamsetji Ratnagar comes forward for that purpose. He is uncle of the insolvent Dhanjibhai, who tells us in his affidavit that he went to that uncle shortly before the insolvent's firm stopped payment, informed him of its great difficulties, and requested him to join with some of the other creditors who had promised to support the firm in an attempt to continue their business. The affidavit then proceeds thus: "The said Jamsetji Ratnagar, thereupon told me that my firm's assets were then still under my control, and that I should pay him in full, and make entries bearing prior dates in my books. I told him plainly that I could not do such a thing, for, notwithstanding his relationship with me, I was bound to treat him on a footing of equality with my other creditors. This refusal on my part gave the said Jamsetji Ratnagar great offence, and since that time he has severed all his connexion with me, and made it his business to annoy me and my co-partners." The affidavit then proceeded to narrate how the scheme to enable the insolvents to continue their trade under inspectors, sanctioned by other creditors, was defeated by Jamsetji Ratnagar shortly before the firm stopped payment. The allegation, that Jamsetji Ratnagar attempted to obtain a fraudulent preference, was contradicted by him in his affidavit in reply. But subsequent events, and an examination of the letters written on his behalf and of their dates, lead us to believe that his conduct was vexatious, and that his nephew's story as to the attempt to obtain a fraudulent preference is true. Jamsetji Ratnagar and Pranjivandas Girdharlal, notwithstanding the deed of composition, having proceeded with their suits against the insolvents, the latter were compelled to file their petition for the benefit of the Insolvent Debtors' Act on the 13th of January 1873. Decrees, with stay of execution, were given in the two suits. On the 22nd January, Jamsetji Ratnagar, being perfectly aware of the deed of composition of the 16th December 1872, and that the three months, within which

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1873. he might come in and execute it, would expire on the 17th March, applied not to the trustees of the deed, with whom he must have known the books of the insolvents were lodged, but to the Official Assignee, on the 22nd January, for inspection of those books, and that he should call upon the insolvents to deposit them; and on the 17th February by another letter requested him to call upon the trustees to deliver them up, and said that the deed of trust was void under Sec. 24 of the Insolvent Act. On the 20th February the Official Assignee informed him that, on the 19th February, a motion, on behalf of Pránjivandás Girdharlál, for a declaration to that effect, was refused by Mr. Justice Gibbs. On the 8th March, the trustees' solicitors warned Jamsetji Ratnagar for the second time (the first being the 23rd December 1872) that the period within which he might execute the deed would expire on the 17th March. Not until the 15th March did any letter on his behalf demanding inspection of the books from the trustees reach them. It was dated the 13th March. On the 17th of March a *mehtá* named Chunilál, in the employment of the firm of Pránjivandás Girdharlál, inspected several books on behalf of Jamsetji Ratnagar, who alleged that the inspection given was insufficient, and that the books yielded no information, which allegation was denied. The firm of Pránjivandás Girdharlál abandoned their opposition to the trust deed and executed it. The applications to the Official Assignee were not, as we think, made with any *bonâ-fide* desire on the part of Jamsetji Ratnagar to see the books, but merely for the purpose of putting the Official Assignee in motion against the insolvents. If Jamsetji Ratnagar really desired to inspect the books, he would, in the first instance, have applied to the trustees in whose custody he perfectly well knew that they were. He made no such application until the eleventh hour, and then endeavoured to gain further time by picking a quarrel about the nature of the inspection given. As to that dispute we do not credit the affidavits filed on his behalf. We are of opinion that he had

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ample time to inspect the books, if he had made an earlier application to the trustees, but that his affected desire to inspect was merely at first a manoeuvre to annoy the insolvents, and, finally, to gain time.

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The proviso, that creditors should execute the deed within three months, was not, at all events as regards those resident in Bombay, unreasonable. Under equitable circumstances courts have allowed creditors to come in after the time fixed, but never where the creditor has throughout set himself in vexatious antagonism to the deed. If the present opposing creditor has lost his opportunity, he has nobody to blame but himself. He has throughout manifested implacable hostility to the deed, and, as we believe, for no other reason than to endeavour to obtain, or because he has failed to persuade the insolvents to give to him, a fraudulent preference over the other creditors.

This deed, which, as the affidavit of one of the trustees shows, has been actually executed by forty-six creditors, representing Rs. 1,50,409-3-0, out of fifty-four creditors representing Rs. 1,81,757-11-11, and is now impeached by Jamsetji Ratnagar only, is certainly for the benefit of the creditors. The cases cited by Mr. Macpherson show that a deed executed under pressure, or upon urgent demand, even in favour of an individual creditor, has been upheld. *A fortiori*, should a deed, in favour of all of the creditors, executed at their instigation, or under pressure, or upon the suggestion of some of them, be supported. There is authority to that effect. Though such a deed does not prevent a non-executing and non-assenting creditor from suing the assignor, yet it does protect the property assigned from execution: *Harland v. Binks* (a), *Janes v. Whitbread* (b), *Bumanji Manikji v. Naoroji Palanji* (c). The cases which have been cited for the opposing creditor, and which were decided on the 224th section of the English Bankruptcy

(a) 15 Q. B. 713.

(b) 11 C. B. 406.

(c) 1 Bom. H. C. Rep. 233.

1873. **Act of 1849 (12 & 13 Vict., c. 106), or upon the 192nd section of the English Bankruptcy Act of 1861, are not in point here. Those enactments made composition deeds, executed in compliance with the statutory requisites, obligatory upon all of the creditors, whether assenting or non-assenting to the deed, and prevented them from suing the traders who executed such deeds. Hence those deeds are canvassed with greater strictness by the courts than deeds, such as the deed here, executed under a different state of law, which does not deprive the non-assenting creditor of his right of action.**

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For these reasons, we affirm the order of Mr. Justice Pinhey with costs.

This case was again mentioned on the 21st August, and the following supplementary remarks made by :—

WESTROPP, C.J.:—The indisposition of the learned Advocate General having unfortunately prevented him from attending in Court on the last day on which this case was argued, and then disposed of by the Court of Appeal (consisting of my brother GREEN and myself), he has since been so kind as to mention to us four cases, *Binns v. Towsey* (d), *Gibson v. Musket* (e), *Jackson v. Thompson* (f), and *Thompson v. Jackson* (g), which, if he had been present, he had intended to cite on the question whether a conveyance, in trust for the benefit of all creditors who may sign the same, is a voluntary conveyance, and therefore void within the 24th section of the Indian Insolvent Debtors' Act.

There cannot be any doubt that where the trader so assigning has acted under pressure of his creditors, or where, as in *Arnell v. Bean* (h), some new consideration for the assignment has been given, such deeds have been upheld. On the other hand, where neither of those circumstances existed, similar deeds have been held voluntary, and, therefore, void.

(d) 7 A. & E. 869.

(e) 4 M. & Gr. 160.

(f) 2 Q. B. 887.

(g) 3 M. & Gr. 621; S. C. 4 Scott N. R. 234.

(h) 8 Bing. 87.

The four cases furnished to us by the Advocate General were of the latter kind. At page 871 of the report in 7 Ad. & E. of *Binns v. Towsey*, it is expressly stated that no evidence was given of the insolvent (who was in custody at the time) having executed the composition deed under pressure from creditors, and it was not contended that there was any new consideration; and, indeed, the deed recited that the proposal to assign emanated from the insolvent himself. Littledale, J., said: "If there were a new consideration, I should say that the assignment was not of itself voluntary: but the absence of such a new consideration makes it voluntary. If the assignment were made under the pressure of creditors, that also would make it not voluntary. These two circumstances, pressure of creditors and new consideration, constitute the only cases, which occur to me, in which the assignment would not be voluntary." And Coleridge, J., said: "Now this is the case of a party assigning, not indeed for a particular creditor, but for all, spontaneously, and without pressure or new consideration." In *Gibson v. Muskett* (i), the decision turned upon the fact that the trader Harris, being indebted to Martin, the latter, who had thrice refused to agree to a composition of 7s. 6d. in the pound, filed in the Court of Bankruptcy an affidavit of the amount due to him from Harris, pursuant to the Statute 1 and 2 Vict., c. 110, sec. 8, and a copy thereof with a notice requiring immediate payment of the debt was served on Harris on the 15th of March. Harris's goods were advertised for sale by an auctioneer on the 21st. An hour before the sale, notice was served upon him, at the instance of Martin, that proceedings had been instituted for the purpose of making Harris a bankrupt. The sale, however, took place, and, out of the proceeds, the auctioneer, on the 5th April, paid to various creditors of Harris, including the defendant, the composition of 7s. 6d. in the pound. Harris not having complied with the requisites of the Statute 1 and 2 Vict. c. 110, sec. 8, a fiat in bankruptcy, at the suit of Martin, was issued against him on the

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1873. 9th April. Subsequently, the plaintiffs, being appointed the assignees of Harris in bankruptcy, sued the defendant for the amount paid to him. The Jury returned a verdict for the defendant, which the Court of Common Pleas set aside, because Harris, on the 5th of April, when the payment was made on his account to the defendant, must have known that, at any rate on the 6th, he would be in a situation that Martin might, at any time within two months afterwards, sue out a fiat in bankruptcy against him, unless he performed one of the three conditions of the Act, none of which he was able to fulfil. The payment, therefore, was one made in contemplation of bankruptcy, and invalidated by Statute 1 and 2 Vict. c. 110, sec. 59. In India there is not any enactment similar to the 8th section of that statute. The enactment for India, which approaches most nearly to it, is the 9th section of the Indian Insolvent Debtors' Act, 11 and 12 Vict., c. 21, under which the opposing creditor here has not taken any steps whatever. That section relates exclusively to traders, whereas the 24th section is general.

As to *Gibson v. Muskett*, it should be further observed that we do not find that there was any pressure put upon Harris to enter into the composition, or that any deed of assignment to trustees for his creditors was actually executed by him, and, in fact, only fourteen out of thirty-three creditors had agreed to accept the composition; so the majority was against it. These circumstances sufficiently distinguish that from the present case.

Thompson v. Jackson (j) and *Jackson v. Thompson (k)* (which arose upon one and the same deed, executed in May 1839 by Franks, a trader, assigning all of his property, except leasehold, to Thompson, a creditor, in trust for such of the other creditors as should execute the deed, and authorizing him to carry on the trade for the benefit of the creditors) approach, in some respects, more nearly to the present case

(j) 3 M. & Gr. 621; 4 Scott N. R. 234.

(k) 2 Q. B. 887.

than either of the two cases already mentioned, but differ from the present case in some important particulars. There was some conflict of evidence between Franks and his agent, an accountant named Jones, as to the quarter whence the suggestion proceeded that the deed should be executed. Franks said that the suggestion came from a creditor at the second meeting of creditors, whereas Jones, the agent, said that he proposed it at the first meeting on the part of Franks (see 2 Q. B. p. 890); and the Court and Jury would seem to have accepted the latter statement as the true history of what occurred. The question, whether the assignment to Thompson was voluntary or not, was, in *Jackson v. Thompson*, submitted to the Jury with a strong intimation of opinion by the Judge in favour of the affirmative. Most of the creditors had verbally agreed at the first meeting to accept a composition of 6s. 8d. in the pound, but none of them except Thompson executed the deed. It contained a clause that in the event of Franks subsequently taking the benefit of the Bankruptcy or Insolvency Laws, the release in the deed by the creditors should become void. In pursuance of the deed, Thompson carried on the trade at Franks' shop, but never took possession of the furniture in his dwelling-house. Franks, being arrested for debt on the 24th June 1839, took the benefit of the Insolvent Debtors' Act. Jackson and Garnett (creditors who had declined to accede to the composition) sued, as Franks' assignees in insolvency, to recover from Thompson the property of Franks. The Jury found the assignment to Thompson to be voluntary, and accordingly gave their verdict for the plaintiffs. The Court of Queen's Bench, being satisfied with the finding that the deed was voluntary, upheld the verdict, but admitted the soundness of the decisions by which general deeds of composition obtained by pressure of creditors, or for some new and valuable consideration, had been supported. In that case, the Court of Queen's Bench, and in *Thompson v. Garnett* (1) the Court of Common Pleas, deemed Franks to be the

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(1) 3 M. & Gr. 621; 4 Scott N. R. 234.

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originator of the deed, and laid much stress on that fact, and on his having convened the meetings and instructed Jones to prepare the deed, and were of opinion that he was not subjected to any pressure to execute it. In the present case, however, we have clearly arrived at the conclusion that the insolvents were subjected to pressure for payment by their creditors, and under that pressure convened a meeting of their creditors in order to consult them as to the course which they should pursue; that the creditors then passed a resolution that the insolvents' affairs should be liquidated under a private deed of trust, as a more advantageous course for the general body of creditors, than that the winding up should be effected through the instrumentality of the Insolvent Court; and that the opposing creditor, on whom lay the burden of proof that the deed was voluntary, had failed to show that the insolvents suggested the passing of that resolution. The insolvents did execute such a deed, it has been signed by almost all of their creditors, and the only person who now objects to it, is the uncle of one of the insolvents, and, as already fully expressed by us, so objects for no other reason, in our opinion, than anger, because he failed in inducing the insolvents to give him a fraudulent preference over the other creditors. The 24th section of the Insolvent Debtors' Act declares such voluntary conveyances as therein mentioned to be fraudulent and void as against "the assignees" in insolvency. Here the assignee does not complain of the deed and was no party to the opposing creditor's application to Mr. Justice Bayley. In all of the cases recently mentioned by the Advocate General to us, it is observable that the assignees in bankruptcy or insolvency were, either as plaintiffs or defendants, parties to the suit; but in this case it is not so, and, under such circumstances as exist here, it would, we think, have been very difficult, indeed, to induce the Court of Insolvency to direct the Official Assignee to take proceedings for the purpose of frustrating the deed of trust and promoting the purpose of the opposing creditor, and thus defeating the wishes of the great majority of creditors.

It should also be noted that there is not here any such provision as to carrying on trade as in *Thompson v. Jackson* and *Jackson v. Thompson*, and as was held to invalidate a deed of composition against non-executing creditors in *Owen v. Body* (m).

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The dicta of some of the Judges in *Davies v. Acocks* (n) to the effect that generally an assignment by a debtor, he being at the time in a state of insolvency, of all his property for the benefit of *all* his creditors, was not void within the meaning of the Statute 7 Geo. IV., c. 57, sec. 32 (similar to the 59th section of Statute 1 and 2 Vict., c. 110), were not approved in the four cases lately mentioned by Mr. Scoble, but, in all of those cases, the decision in *Davies v. Acocks* that the deed of composition, having been there executed under considerable pressure used by the creditors, was not voluntary, and was therefore not invalidated by the Statute 7 Geo. IV., c. 57, sec. 32, was approved. To the same effect is *Knight v. Fergusson* (o), where notwithstanding an erroneous recital that the proposition to assign originated with the insolvent, yet it being proved that the proposal emanated from a creditor, the deed of composition for the benefit of all of the creditors was upheld. See also *Doe v. Gillett* (p), *Mogg v. Baker* (q).

(m) 5 Ad. & E. 28.

(n) 2 C. M. & R. 461; S. C. 1 Gale 251.

(o) 5 M. & W. 389.

(p) 2 C. M. & R. 579.

(q) 4 M. & W. 348.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 69 of 1873.*1873
July 10.MOR JOSHI *Appellant.*MUHAMMAD IBRA'HIM et al *Respondents.**Civil Procedure—Sec. 260 of Act VIII. of 1859—Benámi Purchase.*

A's property is sold under a decree to B, a bona-fide purchaser, who offers to A to reconvey to him on being repaid the purchase money.

Held that if A accepts the proposal, Sec. 260 of the Civ. Proc. Code does not preclude a contract from arising.

THIS was a special appeal against the decision of H. Birdwood, Judge of the District of Ratnágiri, confirming the decree of the First Class Subordinate Judge at that station.

The special appeal was heard by MELVILL and WEST, JJ.

Shántdrám Náráyan for the appellant.

Shivshankar Govindrám for the first respondent. The other respondent put in no appearance.

MELVILL, J. :—The facts of this case are undisputed, and there is no reason to suppose that they are misrepresented. The plaintiffs' property being for sale under a decree, the first defendant purchased it with his own funds; but, probably because he was a friend of the plaintiffs' and wished to give them a chance of redeeming their property, if their circumstances should improve, he agreed to reconvey to them on receipt of the purchase money, and a promise to this effect was made in writing on the day after the sale. The plaintiffs, by their assignee, now sue to compel the defendant to receive the amount of the purchase money, and to execute a conveyance. Both the Courts below have dismissed the suit, on the ground that it is prohibited by Sec. 260 of the Code. But we are of opinion that the object of that section is to prevent, what are called in this country *benámi* purchases, i.e., purchases made in the name of one person with the funds and for the benefit of another: *Moulvi Syad Azhar Ali v. Mussamat Bibi Altaf Fatima* (a)—the effect of which, if they were

(a) 4 Beng. L. Rep. P.C.1.

allowed in the case of execution sales, might be to render it unsafe for third parties to deal with the certified purchaser as the real owner of the property. The transaction in the present case involved no such danger, and appears to us to come neither within the spirit nor the letter of Sec. 260. The defendant did not purchase on behalf of the plaintiffs, but on his own behalf. He paid the purchase money, he became the legal owner of the property, he held it free from any trust, and was in a position to convey a good title to any other person. We think, therefore, that the decrees of the Court below must be reversed.

It is contended for the defendants that the promise was without consideration. That document shows nothing more than a proposal to sell, and the defendant cannot be compelled to carry the proposal into effect, unless it be proved, on the part of the plaintiffs, that there was such an acceptance of the proposal and reciprocal promise by the plaintiffs as will render the whole transaction a valid contract. The case must be remanded for a determination of this question.

Costs to follow final decision.

Decree reversed and case remanded.

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[APPELLATE CIVIL JURISDICTION.]

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August 28*Regular Appeal No. 42 of 1873.*

✓ PRALHA'D MA'HA'RUDRA *Appellant.*
A. C. WATT, LATE SENIOR ASSISTANT JUDGE
OF POONA AT SHOLAPUR, and others ... *Respondents.*

Judge knowingly and maliciously issuing an illegal order while acting judicially—Jurisdiction—Malice—Cause of action against a Judge—Act XVIII. of 1850—Limitation—Suit for damages for wrongful deprivation of property—Act. XIV. of 1859, Sec. 1, cls. 2 and 16.

A plaint against a Judge, averring that the Judge, knowingly and maliciously, issued an illegal order to the plaintiff's injury, does not disclose a sufficient cause of action against the Judge. It must not only aver that the Judge had no jurisdiction, but also that he had no reasonable and probable cause for supposing that he had jurisdiction.

To a suit to recover damages caused by wrongful deprivation of property, the limitation of six years applies under Sec. 1, cl. 16, of Act. XIV. of 1859, and not of one year under cl. 2.

THIS was an appeal from the decision of E. Cordeaux, Assistant Judge, F. P., at Sholapur, rejecting the plaintiff's claim.

The plaintiff alleged that the first defendant, Mr. A. C. Watt, when Senior Assistant Judge, F. P., at Sholapur, knowingly and maliciously issued, on the 28th of September 1870, an illegal order, which the second defendant, the Názir of his Court, executed, though aware of the illegality of the order; and, moreover, in doing so, exceeded the limit prescribed by it, and deprived the plaintiff of all his property. He, therefore, sued them as well as the third defendant, at whose instance the order had been issued.

The defendants, *inter alia*, pleaded that the suit was barred by cl. 2, Sec. 1, of Act XIV. of 1859.

Mr. Cordeaux rejected the claim as barred on the following authorities: *Amirthhammál v. Ranganádha* (a); *Sheikh Ahme-doolla v. Hur Churn Pandah* (b); *Ramnath Roy Chowdhry v.*

(a) 3 Mad. H. C. Rep. 165.

(b) 2 Cal. W. Rep. Civ. R. 235

Huro Chunder Roy Chowdhry (c) ; and *Kázee Nasseentoollah* 1873.
v. Roop Sona Bebee (d).

The appeal was heard by WEST and NA'NA'BHA'I HARI-
 DA'S, JJ.

PRALHA'D
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 v.
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Sitáráam Pandit and *Janárdhan Sakháráam Gádgil* for
 the appellant.

Dhirajlál Mathurádás, Government Pleader, for the first
 respondent. The other respondents did not appear.

Dhirajlál :—Admitting every allegation in the plaint to
 be true, it does not disclose a cause of action against the
 first respondent.

The facts admitted in the plaint are 1st, that Mr. Watt was
 a Judge, and 2nd, that he acted judicially. The plaint then
 alleges that he knowingly and maliciously issued an illegal
 order to the prejudice of the plaintiff. There is no allega-
 tion that there was no reasonable and probable cause for issu-
 ing that order. Even granting that the Judge was depraved
 enough to issue the order maliciously, there is no cause of
 action against him : *Girdharlál v. Jagannáth* (e), Broom's
 Legal Maxims, 5th Ed. pp. 85 to 87. In the case of *Hari*
Rávi v. Janárdhan Vásudevji, Special Appeal No. 41 of 1873
 (f), the plaint did allege want of good faith in the defendant,
 who was a Small Cause Court Judge ; but the Court held that,
 as he had issued his order in his judicial capacity, in a matter
 in which he had jurisdiction, no action lay against him.

Sitáráam and *Janárdhan*, *contra* :—In the plaint these three
 words occur, viz. ' maliciously,' ' illegally,' and ' knowingly,'
 which if liberally construed mean that Mr. Watt had no
 jurisdiction. But, supposing that the plaint does not aver
 want of jurisdiction, Mr. Watt did not act reasonably,
 carefully, and circumspectly, and was, therefore, liable :
Vináyak Divákar v. Báí Itchá (g), *Vithobá Malhári v. Corfield*
 (h). It is not necessary to specifically aver want of jurisdiction.
 It is implied in the allegation in the plaint. With regard to the
 case against the other respondents, there is an averment in the

(e) 5 Idem 50.

(d) 7 Idem 499.

(e) Ante p. 182.

(f) See note at end of the case.

(g) 3 Bom. H. C. Rep. A. C. J. 36.

(h) Idem. Appx. 1.

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plaint that the second defendant exceeded the order given by the first defendant. So that there can be no doubt that against the second and the third defendants there is a cause of action; and the Assistant Judge below was wrong on the very authorities quoted by himself on the point of limitation. No injury is alleged in this case to any person or personal property, and, therefore, cl. 2, Sec. 1. of Act XIV. of 1859 has no application. Six years under clause 16 have been applied both at Calcutta and Madras.

WEST, J.:—On behalf of the first respondent in this case, the objection has been raised that the plaint discloses no cause of action as against him, and to this contention we are compelled to yield. The suit against the first defendant was expressly in his character of Assistant Judge of Sholapur. The act complained of was an order issued by him in that capacity. It was not alleged that it was one that he had no jurisdiction to issue. If the order had been one beyond his jurisdiction, it would still have been necessary to aver that there was no reasonable and probable cause for the Assistant Judge's supposing, after due inquiry, that he had jurisdiction to issue the order (Act XVIII. of 1850); but whether he had reasonable and probable cause or not, cannot be a material question where, by the absence of any allegation to the contrary, it is admitted that he had jurisdiction, and, in the exercise of it, did the act complained of.

It has been argued that as the plaint complains that the Assistant Judge "knowingly and maliciously issued illegal orders," a cause of action is sufficiently set forth in it. Illegal orders, it has been urged, when knowingly and spitefully made, constitute an excess of jurisdiction, since no one is invested with authority to pervert or abuse the law. The answer to this is, that although the law cannot, and does not, contemplate its perversion by its own ministers, yet jurisdiction is a capacity to command, which is not made in any way dependent upon the private motives or the conscientiousness of the officer invested with it. He may be actuated by the very worst feelings towards the person affected by his order, and yet keep strictly within his jurisdiction. And if

he does keep within his jurisdiction, it is a well established principle that he is not civilly responsible to the party who may, however justly, think he has been injured by the Judge's acts. A Judge, in fact, exercising the functions of adjudication and those immediately ancillary to it, represents the State. He is appointed by it, and, while acting within the province assigned to him, is responsible to the State alone for any abuse of the powers it has assigned to him. This accounts for what was insisted on as a strange anomaly, that a Judge should be criminally responsible at the same time that no suit for damages can be entertained against him. The State may prosecute and punish him for a gross dereliction of duty, at the same time that it will not allow him, so long as he sits as its representative, to be harassed by actions brought by disappointed suitors to whom, except immediately through it, he is under no legal obligation.

When to this consideration we add that of the infinite confusion and probable dead-lock which would arise from the legal possibility of every losing party, of whom there must be one in every suit, bringing an action against the Judge, and of the Judge in his turn, if unsuccessful, suing the other Judge who had pronounced against him, it is not at all surprising that a protection against such proceedings should have been recognized as necessary in every system of jurisprudence. The law in England and in India, tender as it is of the rights and privileges of individual subjects of Her Majesty, will not allow those rights to be protected in casual instances at the cost of undermining the authority of the tribunals on which the rights and the welfare of all depend. The cases cited before us, to support the opposite view, are really instances of the exercise of power without jurisdiction—physical power used in an unlicensed way quite beyond the scope of the magistrate's commission, while the decision of the Court of Exchequer in the case of *Scott v. Stansfield* (i), is an emphatic assertion of the correct doctrine based on a full examination of the subject. It has been followed by this Court in the recent case of *Hari Ravi v.*

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(i) L. R. 3 Exch. 220.

1873. *Janárdan Vásudev*, and similar principles are involved in the judgment delivered by the Chief Justice in the case of *Girdharlál v. Jagannáth (j)*.
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As the plaintiff, therefore, alleged no act on the part of the Assistant Judge, by which he transgressed his jurisdiction, it was immaterial that it ascribed evil and unworthy motives to him. If, as has been suggested, the plaintiff really meant to say, that the Assistant Judge had acted without jurisdiction, and without reasonable grounds for supposing that he had jurisdiction, he should have said it. As he failed to do so, we follow the judgment last cited in pronouncing the plaintiff manifestly defective, and such as ought not to have been received by the Court of first instance. On this ground we affirm the decision of the Court below, so far as the first respondent is concerned. Costs on appellant.

The question between the other respondents and the appellant, is whether the suit was barred by limitation or not. The Assistant Judge has held that it was, and this conclusion he has supported by an intelligent argument; but the cases he cites show clearly that the authorities are against the view he has taken. No decision of this Court has been cited as to whether cl. 2 of Sec. 1 of Act XIV. of 1859 applies or not to a suit like the present one; but the mere absence of a decision almost necessarily implies the recognition here by the legal profession of what must be regarded as the settled doctrine of the High Courts at Calcutta and Madras. The case is one of simple obscurity of expression in an enactment; and in such a case we think it right to abide by the solution arrived at by the highest authorities, unless we can see clearly that it is wrong. We

NOTE.—The plaintiff, Hari Rávji, sued Janárdan, the Judge of the Small Cause Court at Puna, for damages, arising from his want of good faith in granting his sanction to a third party to prosecute the plaintiff for the offence of having obtained execution of his *entire* decree against the third party, withholding from the knowledge of the Judge that part of such decree had been satisfied. Hari Rávji was acquitted on the ground that he was not aware of the payment. This act of the Judge was held by MELVILL and WEST, JJ., to be done by him while acting in his judicial capacity, and that, therefore, he was not liable to an action in respect of such an act (*Scott v. Stansfield*, L.R. 3 Exch. 220).—ED.

(j) Ante p. 182.

are far from seeing this in the present instance, and we, ^{1873.}
 accordingly, reverse the decree of the Assistant Judge as ^{PRALHA'D}
 between the appellant and the second and third respondents, ^{MA'HA'RUDRA}
 and remand the cause for retrial on the merits and a new de- ^{P.}
 cree. Costs to follow the final decision, in so far as the ^{A. C. WATT.}
 parties exclusive of the first respondent are concerned.

Decree accordingly.

28.3.22 L. 14.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 84 of 1873.

July 16.

BHIKA'JI APA'JI, son and heir of the *approved by the P.T.*
 deceased defendant *Appellant. I. L. R. 6 Feb. 764.*
 JAGANNA'TH VITHAL *Plaintiff and Respondent.*

Suit by reversioner—Limitation—Act XIV. of 1859, Sec. 1, cl. 16. J. L. R. 2 Bom. 1123.

A suit for a declaratory decree must be brought by the nearest reversioner, but there is no objection to a suit by a more distant reversioner when the prior rights of the nearer reversioner or reversioners have been waived.

A suit by a reversioner during a widow's lifetime, to declare a conveyance made by her to be void, must be brought within six years from the date of conveyance, Act XIV. of 1859, Sec. 1, cl. 16.

THIS was a special appeal from the decision of E. T. Candy, Extra Assistant Judge of Ratnagiri, reversing the decree of the Subordinate Judge of Dápoli.

The facts, in so far as they are material, are briefly as follow:—

Ramábái, a Hindu widow, owned a piece of land. She mortgaged it to the defendant with possession, and then transferred her equity of redemption to the plaintiff. The plaintiff, thereupon, sued the defendant for redemption, but was met on the grounds that Ramábái had sold the land to the defendant, and that she had no right to alienate it to the plaintiff. The plaintiff, therefore, now sues as a reversionary heir for a decree declaring the sale by Ramábái to the defendant invalid. The defendant, *inter alia*, contend-

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ed that Ramábái having nearer heirs than the plaintiff, he had no right of action, and that the suit was also barred by the statute of limitation.

The court of first instance rejected the claim ; but on appeal a decree was made declaring the sale by Ramábái to the defendant void.

The special appeal was heard by MELVILL and WEST, JJ.

Shántarám Náráyan for the special appellant.

Dhirajlál Mathurádás, Government Pleader, and *Chunilál Mániklál* for the special respondent.

PER CURIAM :—This suit has been brought to recover certain land from the defendant, who is a purchaser from Ramábái, a Hindu widow, having a life-interest in the property. Ramábái is still alive, and, therefore, the suit could not be maintained in the form in which it was brought, viz., that of an action of ejectment. The Lower Appellate Court has, however, made a declaratory decree, in the plaintiff's favour, to the effect that the deed of conveyance is not binding on the plaintiff ; and, as no objection has been raised in special appeal to the difference between the relief granted and the relief sought, we may treat the suit as having been brought for a declaratory decree.

The first objection raised in special appeal has been that the plaintiff is not the next reversioner, inasmuch as Ramábái has a daughter living, and that therefore he is not competent to sue. But we find that this daughter has put in a petition in the suit, in which she admits that she has resigned, in favour of the plaintiff, all her rights in the particular property now in dispute, and expresses her willingness that he should be recognized as entitled to that property. While we think that, as a general rule, a suit for a declaratory decree must be brought by the next reversioner, yet we see no objection to a suit by a more distant reversioner when the prior rights of the nearer reversioner or reversioners have, as in the present case, been waived or abandoned in his favour. In support of this view, we may

refer to the cases of *Muluk Fugeer v. Lalla Manohur* (a), and *Bal Gobind Rám v. Hirusraee* (b).

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The next objection is that the suit is barred by limitation.

We think that a suit by a reversioner during a widow's life-time, to obtain a declaration that a conveyance made by her is void, must be brought within six years from the date of the conveyance—Act XIV. of 1859, Sec. 1, cl. 16. The sale to the defendant took place in 1854, but the deed of sale was not stamped till 1865, and under the provisions of Regulation XVIII. of 1827, Sec. 14, it is only valid against the plaintiff, a third party, from that date: *Jagannáth Vithal v. Apáji Vishnu* (c). The suit is brought within six years from the date of stamping. It is indeed contended for the special appellant that he can maintain his title, independently of the deed of sale, on the strength of certain documents in this suit, which show that in 1855 Ramábái had the land transferred to the defendant's name with the usual formalities, on the ground that she had sold the land to the defendant. We might have to consider how far this argument is valid, if the decree of the Lower Appellate Court declared the sale by Ramábái to the defendant to be void. But this it does not do. It simply declares that the deed of conveyance is not binding on the plaintiff, and the plaintiff is not barred by limitation from obtaining a decree in that form, though it will be of little value to him, if, in any future litigation for possession, the defendant is able to maintain his title independently of that deed of conveyance. The objection to the decree of the Court below founded on the law of limitation must, accordingly, be overruled.

We confirm the decree of the Lower Court, declaring that the deed of conveyance is not binding on the plaintiff, but this decree will not affect any title which the defendant may be able to establish independently of that deed.

Under the circumstances of the case, we direct that each party bear his own costs throughout.

Decree confirmed.

(a) 2 N. W. P. Rep. 31. (b) 2 Calc. W. R. Civ. R. 255.
(c) 5 Bom. H. C. Rep. A. C. J. 217.

1873.
July 15.

[APPELLATE CIVIL JURISDICTION.]

Referred Case.

IN RE TUKA'RA'M HARI A'TRE ET AL.

General Stamp Act XVIII. of 1869, Secs. 3 and 14—Conveyance.

An instrument, which purports to convey two or more properties for a sum of money, composed of items described in the instrument as the values of those properties, is simply a deed of sale coming under the definition of "conveyance" in Act XVIII. of 1869, Sec. 3. The stamp duty, properly leviable upon such an instrument, should, therefore, be calculated upon the aggregate sum specified therein, and not upon the various items composing that sum.

THIS was a reference, under Act XVIII. of 1869, Sec. 41, by W. H. Havelock, Revenue Commissioner, Southern Division, for the decision of the High Court.

On the 15th October 1872, Tukárám Hari A'tre executed to Govindráv Chintáman Jog an instrument, the material portions of which are given below :—

" * * * Having received from you Rs. 1,000, one thousand, I have sold to you my estates as particularly described below.

" * * * My own dwelling-house consisting * * *
Value Rs. 375.

" Mirási land * * * Value Rs. 125

" Mortgaged land * * * Value „ 200

" Land situated * * * Value „ 125

" Land situated * * * Value „ 175

" The house and lands, as described and mentioned above, being my own by purchase, together with my *mirási* rights and mortgage lien thereon, I have sold to you as mentioned above * * * "

This instrument, stamped with a stamp of the value of Rs. 10, having been presented for registration to the Subordinate Registrar at Haveli, he objected that it was

insufficiently stamped, the amount of stamp duty having been calculated upon the aggregate sum not upon the various items for which each property had been priced. The Inspector General of Registration was of the same opinion; but, as the Registrar of the district and the Revenue Commissioner held the opposite view, Mr. Havelock referred the case for the orders of the Court.

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IN RE TUKA'-
RA'M HARI.

The reference was heard by WESTROPP, C.J., and MELVILL and NA'NA'BHA'I HARIDA'S, JJ.

WESTROPP, C.J.:—The document, the subject of the present reference, is simply a deed of sale, coming solely under the definition of "conveyance" in Act XVIII. of 1869, Sec. 3. Sec. 14 of the Act is applicable only to instruments "so framed as to come within *two or more* of the definitions in Sec. 3," and the provisoes contained in that section, must be understood as applicable only to the instruments with which the section professes to deal. The document in question here accordingly does not fall within that section or its provisoes, and is, in our opinion, sufficiently stamped.

Reply accordingly.

Act XVIII. of 1869, Section 3 (11):—"Conveyance" means any instrument (except a transfer of a share in a company or association, a mortgage deed, a settlement, a lease, an instrument of re-conveyance of mortgaged property, a composition deed, an instrument of gift, or an instrument of exchange or partition deed, where no money is paid for equality of exchange or partition) by which property is conveyed *inter vivos*.

1873.
July 19.

[APPELLATE CRIMINAL JURISDICTION.]

S.L.R. 5 Rev. 7. 342.

REG. V. PIETA'I.

*Code of Criminal Procedure, Section 66—District—Foreign Territory—
Foreign subject.*

Where a foreign subject, resident in foreign territory, instigated the commission of an offence which, in consequence, was committed in British territory :—

Held that the instigation not having taken place in any district created by the Code of Criminal Procedure, the instigator was not amenable to the jurisdiction of a British Court established under that Code, Sec. 66.

IN this case three prisoners were convicted of murder, and the fourth, Pirtái, of abetment of murder, by R. F. Mactier, Session Judge of Satara, and all of them were sentenced to death.

The facts, in so far as they are material for the purpose of this report, appear from the following extract from the Session Judge's judgment :—

“The first, second, and third prisoners are charged with the murder of one Bábáji, and the fourth, Pirtái, with abetment of this offence. They are all residents of foreign territory, but the offence was committed within the limits of the Satara District; and as regards the first three prisoners there can be no doubt as to this Court's jurisdiction. As to the fourth, there seem to be a few remarks necessary. The charge against her is, in fact, conspiring within the limits of the Kolhapur State to commit a murder which was eventually committed within the limits of the Satara District, and as to this, Sec. 66 of the Code of Criminal Procedure seems to be clear on the point, and the illustration (d) seems to be quite a case in point, and to lay down that if the offence, to commit which the conspiracy was originally organized, was committed in British territory, it does not matter if the conspiracy itself was organized in the Kolhapur State; and if it be the case that the abetment of murder charged against the

fourth prisoner was committed in the Kolhapur State, this will not prevent her being tried by this Court if the offence abetted be shown to have been committed within British territory. This will be done in the following remarks, and in the meantime I need only record my opinion, that under Sec. 66 of the Criminal Procedure Code, this Court has jurisdiction in the case of the fourth prisoner as well as the first three." The Session Judge then proceeded to discuss the merits of the case, and finding, upon the evidence, the charges proved, sentenced all four prisoners to death.

The appeal was heard by MELVILL and WEST, JJ.

No one appeared to support the appeal.

Dhirajlál Mathurádás, Government Prosecutor, appeared on behalf of the Crown.

PER CURIAM:—(After dealing with the cases of the first three prisoners)

With regard to Pirtái, widow of Bábáji, the Court annuls the conviction and sentence. She was a foreign subject, and the act of which she has been convicted, viz., instigation to commit murder, was an offence wholly committed within foreign territory. The Code of Criminal Procedure extends only to British territory, and Sec. 66 assumes the offence therein indicated to have been committed within a district, i.e., within a local jurisdiction created by the code. Sec. 2 of the Penal Code limits the application of that law to offences committed in British India, and Pirtái does not belong to any class made punishable by British Courts, by a special law, as contemplated by Sec. 3.

Order accordingly.

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July '21.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 87 of 1873.

ANTA'JI NILKANTH *et al.* *Appellants.*

JANA'RDAN VA'SUDEV *et al.* *Respondents.*

Stamps—Regulation XVIII. of 1827, Sec. 10—Act XVIII. of 1869
—Stamping an instrument after its execution.

Under Regulation XVIII. of 1827, a party has a right to have stamped, on payment of the prescribed penalty, an instrument executed before 1st January 1870, and a Civil Court should receive such instrument in evidence on being stamped, and cannot reject it on the ground of intention by the party to evade the stamp duty.

THIS was a special appeal from the decision of E. T. Candy, Extra Assistant Judge of Ratnagiri, reversing the decree of the Subordinate Judge of Málwan.

The facts of the case, in so far as they are material, are briefly as follow :—

The plaintiffs, members of the same family as the defendants, sued to obtain their share in certain ancestral lands. The defendants, *inter alia*, pleaded that under the terms of a deed of partition, executed in 1843, the plaintiffs were precluded from bringing their claim. This deed was received by the Court of first instance without any objection being taken either by the Court or the plaintiffs. On appeal an objection raised against it, on the ground that it was not stamped, was allowed, and the instrument being thus left out of consideration, the Court, on the remaining evidence in the case, decreed for the plaintiffs' claim.

The special appeal was heard by MELVILL and WEST, JJ.

Shivshankar Govindrám for the appellants.

Ghanashám Nilkant appeared for the special respondents.

PER CURIAM:—It appears that the deed of partition was admitted without objection in the Court of first instance, but in appeal an objection was taken to it on the ground of want

of stamp. An offer was thereupon made to pay into Court the amount of stamp duty and penalty, but the Assistant Judge refused to allow the defect to be thus remedied, because he was not satisfied that the omission to execute the deed on paper, bearing the proper stamp, did not arise out of an intention to evade payment of the proper stamp (Act XVIII. of 1869, Sec. 20). But it is to be observed that the instrument in question was executed, while Regulation XVIII. of 1827 was in force; and we think that, under that Regulation, a party has a right to have an instrument stamped on payment of the prescribed penalty. The Regulation does not, like the later Stamp Acts, forbid the execution of instruments on unstamped paper, but merely says that they shall not be valid unless stamped; and any instrument originally unstamped, may be subsequently presented to the Collector for the purpose of being stamped. A person who, while the Regulation was in force, executed an instrument on unstamped paper committed no offence against the stamp law, and only ran the risk of having to pay more for his stamp than he would otherwise have paid. There can, therefore, be no reason for imputing, in such cases, an intention to evade payment of the proper duty, and the ground assigned by the Assistant Judge for his refusal to receive the deed of partition in evidence, on payment of the proper stamp duty and penalty, is inappropriate, and must be considered erroneous in law.

We, accordingly, reverse the decree of the Assistant Judge, and remand the case in order that the deed of partition, if held proved, may be received in evidence, after payment of the proper stamp duty and penalty.

The Assistant Judge has not laid down the points for determination as required by law. This should be done at the rehearing of the appeal.

Reversed and remanded.

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[APPELLATE CIVIL JURISDICTION.]

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Special Appeal No. 490 of 1872.

SAINAL RANCHHOD.... Plaintiff and Appellant.
DULLABH DVA'RKA' Defendant and Respondent.

Code of Civil Procedure—Review.

When a review of a decision has been admitted, the whole case is thereby re-opened.

THIS was a special appeal against the decision of E. Hosking, Acting Extra Assistant Judge at Ahmadabad, reversing, in review, the decree of his predecessor, and confirming that of the Court of first instance.

The plaintiff brought this suit, in the Court of the Subordinate Judge of Dhanduka, to restrain the defendant from obstructing the plaintiff in making a drain in a portion of the plaintiff's house. The defendant contested the plaintiff's right to construct the drain. The Subordinate Judge rejected the plaintiff's claim. In appeal, Mr. Scott, the Assistant Judge of Ahmadabad, holding that the plaintiff has established his right to construct his drain, in the way in which he was constructing it, gave a decision in his favor. This decision was admitted to review by his successor Mr. Hosking, who, going through the case *de novo*, came to the same conclusion as the Subordinate Judge, and he, therefore, confirmed his decree, reversing that of Mr. Scott.

The special appeal was heard by MELVILL and NA'NA'BHA'1 HARIDA's, JJ.

Macpherson, (with him *Dhirajlál Mathurádas* and *Girdharlál Dayáldás*,) for the special appellant, contended that Mr. Hosking should have limited his consideration to the grounds on which he admitted the review; and that, as it appeared, after full inquiry, that the new circumstances thus imported into the case did not really affect the merits, it was not competent to Mr. Hosking to disturb the judgment of his predecessor.

Branson (with him *Nagindás Tulsidás*) for the special respondent.

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PER CURIAM:—We adhere to the decision in Special Appeal 200 of 1868, which is in accordance with what has been the invariable rule in this Court, viz., that when a review has been admitted, the whole case is re-opened. The case in Special Appeal 368 of 1872 was a peculiar one, in which the application was by the successful party for correction of a mere clerical error in the decree, and the judgment of this Court appears to have been carefully limited to the circumstances of that case only.

Decree confirmed with costs.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 38 of 1871.

SAKHA'RA'M RA'MCHANDRA

June 26.

DIKSHIT..... *Defendant and Appellant.*

GOVIND VA'MAN DIKSHIT,

purchaser of a decree

obtained by Mádhavráv

Ganesh Deshpándé *Plaintiff and Respondent.*

Agreement—Decree—Hindu Law—Liability of sons and grandsons.

An agreement, entered into before decree, between a person who subsequently became the decree-holder and the defendant, his debtor stipulating that the decree should be enforced in a particular manner, is no bar to the execution of that decree according to its terms.

The property of a Hindu which has descended upon his sons and grandsons is, while in their hands, liable to his debts.

Bombay Act VII. of 1866 does not apply to cases in which judgment had been pronounced before its enactment.

THIS was a miscellaneous special appeal from the order of R. H. Pinhey, Judge of the District of Puna, amending the order of the Subordinate Judge of that place.

The facts of the case will fully appear from the following extract from the District Judge's judgment:—

1873. "Mádhavráv Ganesh Deshpándé obtained a decree for Rs. 1,500 against Moreshtar Dikshit Manohar, on 25th April 1861, in the Court of the Assistant Agent.

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VA'MAN.

"Mádhavráv Ganesh Deshpándé sold this decree to Govind Váman Dikshit Manohar the plaintiff.

"Moreshtar Dikshit Manohar, who was a Sardár, died, leaving heirs.

"Mádhavráv presented an application to the First Class Subordinate Judge at Puna for the execution of the decree.

"The application was opposed on the grounds, that (1) the decree was barred by the law of limitation; (2) the property which Mádhavráv wished to attach was not liable for the personal debts of the original defendant now deceased; and (3) that Mádhavráv was bound by an agreement, made by the plaintiff with the deceased defendant to attach first all the property of the defendant's family.

"On the 17th August 1870 the First Class Subordinate Court (Madan Shrikrishna Judge) holding that the decree was not barred by the law of limitation, and that as the deceased defendant had three sons who were cosharers in the ancestral property with himself, only one-fourth of such property could be attached for the deceased defendant's debts, and that the present application was not in conformity with an agreement made by the parties to the decree, ordered the attachment of one-fourth of the deceased defendant's share of the village of Mohomedvádi, and directed each party to bear his own costs."

In appeal the District Judge raised two issues for decision, viz:—

1. Should the decree, which the plaintiff seeks to enforce, be executed in the manner prescribed in the agreement?
2. Should the shares of the sons of Moreshtar Dikshit deceased be excepted from the operation of the decree which the plaintiff seeks to enforce?

On both these issues he found in the negative, and for the decree-holder, for the reasons thus set forth in his judgment:—

"The agreement was passed before the decree which the plaintiff seeks to execute. It was pleaded by the defendant in the suit as a bar to the decree being passed. Nevertheless the Court, after considering the effect of this agreement, gave a decree for the amount claimed, without making any order for the execution of the decree according to the terms of the agreement.

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"The decree was given for a debt incurred on behalf of a united family. The property, against which the plaintiff seeks to enforce the decree, is the common property of that family. The shares of the deceased defendant have never been divided, and his sons do not appear to have raised any objection, such as the Lower Court raised, as to the non-liability of the property which passed to them from their father for the amount of decree against their father. The division of the property of the deceased defendant into equal shares between the father and the sons, seems to have been the act of the Court acting *proprio motu*."

The special appeal was heard by WEST and NA'NA'BHAI HARIDA'S, JJ.

Shántarám Náráyan, for the special appellant, raised three principal objections against the order of the District Judge, 1st, that he was in error in not considering the agreement entered into between the deceased defendant and the decree-holder in regard to the execution of the decree—this is the proper time for him to do so (Sec. 11, Act XXIII of 1861); 2ndly, that he wrongly assumed that the decree was for a debt incurred for a united family; and 3rdly, that the respondents came into possession of Mahomedvádi in their own right, and not by inheritance from the deceased Moreshtar, and they were, moreover, not liable for his debts under Bombay Act VII. of 1866.

Vishvanáth Náráyan Mandlik for the special respondent:—Sec. 11 of Act XXIII does not apply. It contemplates questions in execution of a decree. The agreement was considered when the decree was passed, and is absorbed in the decree. It cannot be maintained that grandsons have equal

1873. and co-ordinate claim in the grandfather's property. No grant is put in to show that the property had any special character.

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WEST, J.:—In the suit, out of which these proceedings have arisen, the plaintiff was met by an agreement, in which the plaintiff had engaged, in the event of a suit becoming necessary, to execute the decree he might obtain in it, in the first instance, against the property of the other members of the family from which the defendant, Moreshvar, had become separated. The Assistant Agent refused to give effect to this agreement in the way proposed, because it was not meant in any way to impede a suit for the amount due on the bond, though, as he says, there might be a "countersuit on the agreement, in case the plaintiff does not use his decree in the way agreed on." In appeal against the order of the Principal Sadar Amin in execution, the District Judge held that the decree-holder was not bound by this agreement to any particular mode of execution, for the reason that it had been considered in trying the suit by the Assistant Agent, who, nevertheless, had "passed a decree for the amount claimed, without making any order for the execution of the decree according to the terms of the agreement." Against this, it has now been urged that the agreement being, by its terms, expressly intended to come into operation on the passing of the decree, and to regulate the mode of execution, it cannot properly be deprived of this effect by the Assistant Agent having refused to embody its engagements in the decree itself. The question as to its enforcement, it is contended, is one arising in the execution of a decree, and as for this reason, a separate suit, brought upon it, for a breach of contract, will not be maintainable according to Act XXIII. of 1861, Sec. 11, justice requires that it should be enforced in the execution itself. A semblance of support to this latter argument has been drawn from the words "any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree," but these general words, according to the familiar

rule of construction, are to be understood of matter *ejusdem generis*, with that more particularly specified in the same enactment. The only questions, that can properly arise in the execution of a decree, are (1) as to the contents of the order made, (2) as to the jurisdiction to make it, and (3) as to how far it has been carried out. There is here, as usual, no question of jurisdiction; there is no suggestion that the decree has been partly executed so as to exempt from its operation the property sought to be made available for its satisfaction. The only question then, that can remain, must be as to what are the contents of the decree, and these, it is obvious, are in no way dependent on a private agreement between the parties. If that agreement, indeed, could be set up, as limiting the execution of the Court's order, the mere circumstance that the Assistant Agent had refused to give it effect in framing the order itself might not be material, but no authority has been cited for giving to it such an effect as this. An agreement is relied on, because it confers a right. If that right in the present instance was one capable of being set up against the claim made by the plaintiff, it was capable of being adjudicated on in his suit; if it could not be thus set up, neither can it be set up against the execution of the decree, which, for its own purposes, is to be held final as to what the one party must do or forbear for the benefit of the other. It would be an absurd consequence, if a set-off, pleaded and refused recognition at the trial of a suit, could again be advanced in opposition to the execution of the decree. The agreement in this case may or may not be valid. It may or may not have imposed on the plaintiff a duty, the breach of which will form a good ground for a personal action. But it is at best an undertaking which has not yet been clothed with judicial sanction. It cannot prevent the execution of an express order of a Court. The right which a judgment-debtor might base on an actual payment of the sum awarded, would be stronger than that derived from an agreement such as the one now in question, yet the law refuses to recognize it, unless made, as the law itself prescribes, through the Court, and distinctly in obedience to its decree.

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But the property, it is said, in the hands of the persons against whom execution is now sought, is not liable for the decree obtained against the original defendant, Moreshtar. These persons are Moreshtar's sons and grandsons; the present appellant is a grandson. The family, it is said, was divided by a partition made between Moreshtar and his sons, and the question of division, or no division, ought to have been distinctly adjudicated on in the Courts below. The reason it was not expressly adjudicated on was doubtless that it was not distinctly raised. What was relied on was evidently the argument, which, in the early part of the case, was strongly pressed in this Court also, that by the terms of the tenure, each successive generation took the property independently of the one which preceded it. This attempted application of the principles of the Statute De Donis, for regulating the devolution of the estate of a Hindu family, was so far successful as to lead the Joint Judge, when the case first came before him in appeal, to remit it to the Subordinate Judge, with a direction to ascertain whether Moreshtar had had more than a life interest in the property. The Subordinate Judge (Mr. Madan Shrikishnáji), so far as the papers before us show, does not appear to have directly dealt with this question. Perhaps the terms of the grant, which, it is said, created the very special estate, which the appellant asserts, were no more revealed to him than they have been to us. But on the ground that the deceased Moreshtar having had three sons remained owner himself of but one-fourth of the family estate, the Subordinate Judge awarded execution against one-fourth of the property with a further limitation wrongly based on the agreement which has been already discussed. In this decision, the Subordinate Judge implicitly determined that Moreshtar and his sons had formed a united family. Probably the question of separation was not raised before him; but if it was, and was wrongly disposed of, the objection that might have been raised on that ground must be considered to have been waived by its omission from the cross appeal filed by Sakharám in the District Court. It is not sufficient that an

objection in regular appeal, pointed at an altogether different matter, may, by a special interpretation, be made to extend to some point afterwards raised in special appeal. The objection and the issue raised upon it, must be taken in the sense obviously intended. If the District Judge of Puna had misconceived the objections in this case, he would no doubt have been very promptly set right by the pleaders. They allowed him to try the appeal on the assumption that the family was united, and this is a sufficient proof that the ground of partition was not then intended to be relied on. In not examining it, therefore, the District Judge did not commit any error of law.

It must be taken, therefore, as it was in the Courts below, that Moreshvar and his sons were in the usual condition of a Hindu family, that is, undivided. It must be presumed also that he held his property according to the ordinary rules of the Hindu law. The grant, under which it was enjoyed, has not been produced before us. If it was produced before the Subordinate Judge, and wrongly dealt with, that ought to have formed a ground of regular appeal. The obligation of a man's sons and grandsons to pay his debts is, it is admitted, as integral a part of the Hindu law as any rule of succession. The exception, on the ground that the debts were contracted for disreputable purposes, is one of which few sons would avail themselves, and which was not suggested in the present case. The ancestral property has, under such circumstances, even been held by some of the earlier, though not by the more recent, decisions of the late Sadr Court, inalienable until the debts were paid (a). Such a doctrine may not be maintainable; but the property at least descends incumbered with the debts of the ancestor or accompanied by an obligation to pay them. But then it has been urged Bombay Act VII. of 1866 protects the appellant in this case and his brethren. Being joint-tenants with their father during his life, the whole property, it is argued, vested in them by sur-

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(a) The property is not so hypothecated for the debts of the deceased that the heir may not convey a good title to a purchaser See (Jamiyat-rám Rámchandra v. Parbhudás) 9 Bombay H. C. Report 116 Ed.

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vivorship on his death. They received nothing as his representatives, and are therefore exempted from liability by Secs. 1 and 2 of Mr. White's Act. This result, if correctly deduced from its words, would be highly unwelcome, it is certain, to the author of the law. That sons in a united family should take all the property on their father's death, and at the same time be free to repudiate all his debts, was, probably, the last thing he would have desired. We do not think that a construction so encouraging to unconscientiousness is the only one that these sections admit of; but it is not necessary to go further into that subject, because in our view the Act is altogether inapplicable to the present case. No law is, without necessity, to be so construed as to impair rights already fully acquired. The rights of creditors already acquired against sons, grandsons, and heirs, before Bombay Act VII. of 1866 became law, would thus be unaffected by its provisions, but for Sec. 3 which extends its operation to suits in which judgment shall not have already been delivered at the date of the Act. The judgment in this case, however, was pronounced several years before the Act was passed. The rights of the judgment-creditor against Moreshvar, his property, and his successors, were fully acquired, and the Act has not extinguished them. The case stands precisely as if the Act had not been passed, and the whole property is liable. Such was the decision of the District Court, and we confirm it with costs.

Decree confirmed with costs.

[APPELLATE CIVIL JURISDICTION.]

1873.
August 19.*Special Appeal No. 263 of 1873.*

BAKSHIRA'M GANGA'RA'M.....*Defendant and Appellant.*
 DA'RKU TUKA'RA'M*Plaintiff and Respondent.*

Mortgage—Improvements—Accretions—Redemption—Code of Civil Procedure—Sec. 7 of Act VIII. of 1859.

The holder of field, on the Survey tenure, mortgages it with possession, secured by a registry of the mortgagee's name as occupant. Certain fruit trees, coming under the operation of No. 3 of the Revised Survey Rules, are sold, by the Government, to the mortgagee as occupant :—

Held that the trees, by the sale, become a portion of the mortgaged estate, and, as such, liable to redemption, on payment of the amount of the mortgage money with interest, of the money laid out in purchasing the trees, and of other reasonable expenses.

Held also that a suit for redemption of land, without specification of details, includes a claim for restoration of all accretions and improvements which it may have received while in the hands of the mortgagee; and if the Court omits to adjudicate upon part of the claim, the mortgagor is not precluded, by Sec. 7 of Act VIII. of 1859, from bringing a second suit in respect of that part.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmadnagar, confirming the decree of the Subordinate Judge of Sangamner.

The facts of the case are briefly as follows :—

The plaintiff, Dárku, mortgaged in 1846 a field, of which he was the holder under Government, to the defendant Bakshirá'm. In December 1865 the latter being in possession of the field, and entered as occupant in the Collector's books, the Government sold to him, under the survey rules, some mango trees, which Dárku also had applied to purchase. At the beginning of the year 1866, Dárku sued Bakshirá'm for redemption of his field, without specifically including, in his claim, the mango trees on the land which had been sold by Government to the mortgagee while he was the registered occupant of the land.

In August of the same year a decree was made in the plaintiff's favour for the land only. Dárku, therefore, in

1873. November 1870 brought the present suit to recover the mango trees also. The defendant, *inter alia*, pleaded that the suit was barred by Sec. 7 of Act VIII. of 1859, and that the trees were sold by the Government, who were the owners thereof, to him, independently of, and in preference to, the plaintiff. The Subordinate Judge as well as the District Judge awarded the plaintiff's claim.

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The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Ganpatráv Bháskar for the appellant :—When the plaintiff in 1866 brought his suit for redemption of his field, the trees had been sold to the defendant by the Government; and he should have asked for their restoration in that suit. Not having done so, his second suit is barred by Sec. 7 of the Civil Procedure Code: *Báloji v. Tamangoudá* (a). The plaintiff applied to Government for a purchase of the trees, but the Government refused to deal with him, and sold them to Bakshirám, who thereby became the absolute owner.

Bahiravnáth Mangesh for the respondent :—The suit is not barred by Sec. 7: see *Kákáji v. Bápuji* (b). The mortgagee, when he bought the trees, was only entitled to an additional security, but on payment of the purchase money and other reasonable expenses, he was bound to deliver up possession of the trees.

WEST, J.:—We have no doubt that the appellant in this case, Bakshirám, procured a sale of the mango trees to him in his character as occupant of the land which he held as mortgagee from the plaintiff Dárku. The third of the revised survey rules, published at page 109 of Mr. Nairne's compilation, says, "The survey tenure includes the right in all trees standing in occupied lands subject to the following exceptions. * * *

P. (iii) Fruit trees belonging wholly or partially to Government the property in which has not been specially assigned to the occupant or purchased by him."

(a) 6 Bom. H. C. Rep. A. C. J. 97.

(b) 8 Bom. H. C. Rep. A. C. J. 205.

It is quite clear from this rule that the intention of Government was that its ownership should not be parted with, except to the occupant of the land in which trees, its property, might be standing. It is clear also that, on a sale to an occupant, the ownership was intended to coalesce with his right to the occupancy, and, thenceforth, become identical with it. There was no public sale in this case; and when Dárku, the mortgagor, applied for a sale of the trees to him, he was told that he could not be dealt with until he recovered the land. Bakshirám was the registered occupant, and the sale could be made only to him; but having been thus made, the trees, the subject of it, became at once a portion of the holding in his hands. It was as mortgagee that he was occupant, and as mortgagee he got possession of the trees which could be sold to him only as occupant.

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The estate, therefore, including this accession to it of the trees, was liable to redemption by Dárku. If, as appears, the instalment of payment for the trees had still in part to be made good, an account might be taken between Dárku and Bakshirám on that footing. Bakshirám could not, as mortgagee, equitably claim more than the benefit as a security of the addition to the property. He could not use his position to obtain an advantage, whose precise measure would be the loss thus occasioned to the mortgagor in whose stead he had dealt with Government (Fisher on Mortgage 337, 887). On payment to him of the mortgage money and interest, of the money expended by him in purchasing the trees, and of reasonable expenses, he was bound to deliver up possession of the improved estate to Dárku.

In this posture of affairs, Dárku sued to redeem the land. He did not specifically refer to the trees, nor, as we understand, did Bakshirám. But in suing for redemption of his estate, a mortgagor sues for it, without specification of all conceivable details in the state in which it exists at the time. If it has received accretions, or improvements, he claims these in claiming a restoration of that with which they have blended, or to which they have become accessory. On the

1873. other hand, the mortgagee may demand, as a condition of the order for restoration, that all sums properly expended by him shall be made good. That the expenditure by Bakshirám in buying the mango trees was a proper one is acknowledged. The Court, therefore, might, in the redemption suit, have directed an account to be taken, including the price of the trees, and decreed redemption of the whole estate on payment of the sum thus ascertained to be due. Instead of this, it decreed redemption of the land only, on payment of the original mortgage sum, without the trees. It is now contended that no new suit will lie for the trees, as either they were omitted by the plaintiff from his plaint, or else should have been recovered in execution in the former suit; but, we think, that the claim in that suit might reasonably have been, and ought to have been, construed to include them, and that the Court having failed to adjudicate upon this portion of the claim, a fresh suit based on it is competent to the plaintiff: *Seddon v. Tutop* (c), 2 Ev. Poth. 347. There are many cases in the Courts in India which support this view, of which it is sufficient to refer to *Rádhábái v. Rádhábái*, (d), and the recent case of Special Appeal No. 10 of 1872, decided on the 10th June 1872, by Sir C. SARGENT and Mr. JUSTICE MELVILL.

The legal possibility of urging his claim being once admitted, the plaintiff is plainly entitled to retain the decree he has obtained in the District Court. We, therefore, confirm that decree with costs.

(c) 6 T. Rep. 607.

(d) 4 Bom. H. C. Rep. . C. J. 181.

[APPELLATE CRIMINAL JURISDICTION.]

The QUEEN *Appellant.* 1873.
 September 4.
 RAKHMA' and another *Respondents.*

Code of Criminal Procedure, Secs. 272, 283, and 443—Government appeal against acquittal—Omission of the word 'dishonestly' in charge and record of conviction.

The omission of the word 'dishonestly,' both in the charge and in the record of the conviction, is not a ground for reversal of conviction and sentence, where an accused person has fully understood the nature of the offence with which he is charged, and has not been prejudiced by the omission.

Conviction and sentence recorded by a Magistrate, and reversed by the Session Judge upon this ground, restored by the High Court, on appeal directed by Government under Sec. 272, Cr. Proc. Code.

THE respondents were convicted by A. Keyser, Magistrate F. P. at Pandharpur, under Sec. 411 of the Indian Penal Code, for the offence of receiving stolen property, knowing it to be stolen; and sentenced to two months' rigorous imprisonment.

Upon an appeal preferred by the respondents to R. H. Pinhey, Session Judge of Puna, he reversed the convictions and sentences on the following ground :—

"The receipt of stolen property, even if the property be known to be stolen, is not an offence punishable under Sec. 411 of the Indian Penal Code, unless the stolen property be received *dishonestly*. The policeman who brings stolen property before a court, to be used as evidence, receives the property knowing it to be stolen property; but he commits no offence, because he does not receive the property *dishonestly*. In this case, neither in the charge on which the prisoners were tried, nor in the record of the conviction, is it stated that the appellants *dishonestly* received stolen property. They have, therefore, been convicted of what was not an offence punishable under the section of the Indian Penal Code under which they were sentenced."

1873. At the instance of Mr. Keyser, the District Magistrate referred the proceedings to the High Court, which declined to interfere unless the Government should direct an appeal under Act X. of 1872, Sec. 272 (Crim. Proc. Code).

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An appeal having been preferred, and a notice thereof given to the respondents, it was heard by MELVILL and NA'NA'BHA'I HARIDA's, JJ.

Dhirajlál Mathuradás, Government Prosecutor :—The wording of the charge, though it does not contain the word 'dishonestly,' is quite sufficient to apprise the accused persons of the offence charged against them. The evidence in the case also shows the nature of the offence clearly. It cannot, therefore, be said that the accused persons were in any way prejudiced, or that the omission has occasioned a failure of justice. On the contrary, such a failure of justice has been occasioned by the reversal of the convictions by the Session Judge. He referred to Sec. 283 of the Criminal Procedure Code.

[MELVILL, J. :—The illustration (a) to Sec. 443 seems directly in point.]

PER CURIAM :—The Session Judge has reversed the convictions and sentences for no other reason than because the word 'dishonestly' was omitted in the charge, and in the record of conviction. But it is quite clear that the accused persons fully understood the nature of the offence with which they were charged, and that they were not prejudiced by the omission. The omission, therefore, was no ground for the reversal of the convictions and sentences. (The Criminal Procedure Code 1872, Secs. 283 and 443.)

We think that the evidence on the record was sufficient for the conviction of both the accused persons, Rakhmá and Manohar ; and we, therefore, reverse the judgment of acquittal, and restore the convictions and sentences recorded by the Magistrate.

Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

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AMRITLA'L MANSUK..... *Plaintiff.*
MA'NIKLA'L JETHA' and another *Defendants.*

Account Stated—Implied Contract—Limitation—Written Contract—
Sec. 21 of Act IX. of 1871.

An entry of an account stated, made by a debtor in his creditor's books, is not a contract in writing within the meaning of Act IX. of 1871, Sec. 21.

THIS case was referred by Gopál Hari Deshmukh, Judge of the Small Cause Court at Ahmadabad, for the opinion of the High Court, with the following statement of facts :—

“Two partners, Mániklál and Ranchhod, opened a firm under the name of Mániklál Ranchhodás. In Samvat 1924 Ranchhodás wrote a *thámkhátá* in the name of the firm in favour of the plaintiff. In Samvat 1925 and 1926, he continued the account, adding interest and striking balance which was found due. The balance is not signed by any one. In the account of Samvat 1926, payments of two items are written in the handwriting of one of the partners, Ranchhodás. * * *

“The first defendant sets forward, among others, the plea of limitation. He states that the original *thámkhátá* is not a contract according to the judgment of the High Court passed on the 9th April 1872 on reference from this Court in case No. 3380 of 1872, which was as follows: ‘The entry in question is simply the record of a payment of Rs. 101, and contains nothing to show whether that sum is repayable or not. We do not understand it as implying any contract to that effect.’ He further states that the balance, in the Samvat year 1926, not being signed by any of the partners, is not a contract.

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" The plaintiff replies that the judgment referred to was passed before the Indian Contract Act of 1872 came into force, and so is not applicable. That by Sec. 2, cls. (e) and (h) of that Act (Act IX. of 1872) a contract is an agreement, and an agreement must contain a promise. By Sec. 9 of the same Act, a promise may be expressed or implied. He thus reasons and says that a promise is implied by writing the balance as due, and, therefore, it is a written contract.

" If the *thámkhátá* is a written contract, it would give a new period of limitation from the date of the last payment written by Ranchhodás. If the *thámkhátá* is not a written contract, the claim will be barred, the last balance being more than three years old.

" My opinion is that the account produced in this case is a written contract containing an implied promise. The judgment above referred to was on a *thámkhátá*, showing no balance, whereas the present account shows balance, and states that it is due by the firm whose name is mentioned, in the heading of the account. By the High Court's decision in *U'medchand Hukamchand v. Shá Bulákidás* (a), a balance struck is an implied contract in writing, and as such it ought to give a new period of limitation from the date of the last payment."

The case was argued before MELVILL and PINNEY, JJ., on the 2nd September 1873.

Nagindás Tulsidás for the plaintiff.

Shántarám Náráyan for the defendants contended that to constitute a contract in *writing* there must be an express promise in the writing itself. An entry showing an adjustment of account was an admission of a debt, and from such an admission the law implied a promise to pay. There was no express promise in such an entry, as distinguished from a promise implied by such an entry, and therefore it did not amount to a contract in writing contemplated by Sec. 21 of the Limitation Act of 1871.

(a) 5 Bom. H. C. Rep. O. C. J. 16.

MELVILL, J.:—The question referred is whether an entry of an account stated, made by a debtor in his creditor's books, is a contract in writing within the meaning of Sec. 21 of Act IX. of 1871?

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We are of opinion that this question must be answered in the negative.

It is not perhaps necessary for us to adopt so strict a rule of construction as was laid down in the well-known case of *Wain v. Warlters* (b), in which it was held that an agreement is not an agreement in writing, within the meaning of the Statute of Frauds, unless the consideration for the promise, as well as the promise itself, be stated in writing. But we think that at least the promise must be so stated. The entry is nothing more than an acknowledgment of an existing debt, from which the law implies a contract or promise. The consideration for the contract is expressed in writing, but not the contract itself. The entry is not a contract in writing, but a writing from which an unwritten contract may be inferred.

We must, therefore, hold that the suit, in which this reference has been made, is barred by limitation.

(b) 2 Smith, L. Ca. 221, 6th Edn.

1873.
September 12.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 180 of 1873.

KALYAN'BHA'I, SON AND HEIR OF DI'P-
CHAND, deceased.....*Defendant and Appellant.*
MOTIRA'M JAMNA'DA'S*Plaintiff and Respondent.*

Court Sale—Partnership Property.

A suit was brought by *C* against "*A*, as manager of a firm, and also against the firm itself;" and a decree was passed accordingly. *A* was one of two partners in the firm. The other partner (*B*) was not named in the plaint. In execution of the decree, the right, title, and interest of *A* in a stable, which in fact belonged to the firm, was sold to the plaintiff. A suit is now brought by the plaintiff against *B*, the other partner in the firm, to recover possession of the property:—

Held, that the plaintiff is in no better position than a purchaser at a sale of partnership property made in execution of a decree against a single partner, and that he cannot be allowed to effect a partial partition, which the judgment-debtor, to whose right he succeeds, would not have been entitled to obtain. All that the plaintiff can do is to bring a suit for an account and settlement of the whole concerns of the firm, and claim that interest in the property, which, upon a final settlement, may be ascertained to belong to his judgment-debtor.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of the District of Surat, confirming the decree of the Subordinate Judge of that station.

The appeal was heard by MELVILL and PINHEY, JJ.

Shivshankar Govindrám for appellant.

Girdharlál Dayáldás for *Dhirajlál Mathurádás*, Government Pleader, for respondent.

The facts sufficiently appear from the following:—

PER CURIAM.—The plaintiff is purchaser of a stable at a court sale. The suit, in which the decree was obtained, was, in accordance with an irregular practice too common in the mofussil, brought against Dhulabhái, as manager of a certain firm, and against the firm itself, without any specification of the names of the partners. Dhulabhái and Dípchand, the defendant in the present suit, appear to have been partners; but Dípchand was not formally made a party to the suit.

The decree was passed, in terms similar to those of the
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 complaint, against Dhulabhái, as manager of the firm, and against
 the firm itself.

On an application for execution, the Subordinate Judge made an order that the right, title, and interest of Dhulabhái only should be sold, and in the certificate of sale, given to the plaintiff, that right, title, and interest, and nothing more, are specified. The District Judge was of opinion that it was intended to convey the whole right, title, and interest of the firm, though the name of the firm was by mistake omitted in the certificate; and, accordingly, as he found that the stable was the property of the firm, he awarded possession to the plaintiff. But we think that it is impossible for us to hold that the plaintiff acquired anything more than was ordered to be sold, and than was specified in his certificate of sale. If the certificate was defective, it was his own fault that he did not have it corrected. But we cannot say that the Subordinate Judge's order, that the interest of Dhulabhái only should be sold, was necessarily a mistake. It may have occurred to the Subordinate Judge that, in consequence of the non-joinder of any other partner in the suit otherwise than by the vague description of "the firm," the decree did not really bind any other person than Dhulabhái, and that therefore only Dhulabhái's interest could be sold. However this may be, we must hold that the plaintiff is in no better position than the purchaser at a sale of partnership property, made in execution of a decree against a single partner.

Regarding the position of such a purchaser, there can, we think, be no doubt. It is fully discussed by Mr. Justice Story in his Equity Jurisprudence, Secs. 677, 678, and in his work on Partnership, Secs. 261, 262. The purchaser takes only the same interest in the property purchased, which the judgment-debtor would have upon the final settlement of all the accounts of the partnership. He becomes a tenant-in-common of the property, but without any power to take

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Seenemarks

of Whittop
C.J. on this
passage
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any portion of it out of the possession of the other partners. All that he can do is to bring a suit for an account and settlement of the partnership concerns, and thus entitle himself to that interest in the property, which, upon a final settlement, may be ascertained to belong to the execution partner.

We may no doubt be pressed by the argument that it is the practice of our Courts, in the case of a united Hindu family, to allow the creditor of a single coparcener to attach and sell not only his debtor's share in the entire family property, but his share in a particular portion of the property, such as a house or a field, and that the purchaser at the sale is allowed to have actual partition of the house or the field. The condition of a united Hindu family is not identical with that of a mercantile firm: but it must be admitted that the principle, which ought to regulate the seizure of the joint property for a separate debt of one of the coparceners, is theoretically very much the same, and that it is somewhat anomalous to allow an auction-purchaser to effect a partial partition, which the judgment-debtor, to whose rights he succeeds, would not have been entitled to obtain. But the law on this subject must be considered to be settled for this Presidency by the judgments in *Vasudev Bhat v. Venkatesh* (a) and the Full Bench case *Fakirappa v. Chanappa* (b). In those cases, we avowedly proceeded rather on the ground of long established precedent than of abstract principle; and we are in no way constrained to initiate a similar practice, for which there is no precedent, in dealing with the joint property of a mercantile firm.

We reverse the decrees of the Courts below, and disallow the claim. The plaintiff must bear all costs in the Court of first instance; but, under the circumstances, we order that the parties bear their own costs in appeal and special appeal.

Decree reversed and claim disallowed.

(a) Ante p. 139.

(b) Ante p. 162.

[APPELLATE CIVIL JURISDICTION.]

Civil Petition.

1873.
July 29.

KHEMKOR, WIDOW OF RANCHHORPlaintiff.

UMIA'SHANKAR RANCHHORDefendant.

Hindu law—Nátrá—Maintenance—Concubine.

Among the Sompurá Brahmins a widow who has remarried in the lifetime of her first husband without his consent, cannot be regarded as the lawful wife of her second husband, but is entitled to maintenance, as his concubine, from his property.

Quære—Whether consent of her first husband would have rendered the second marriage valid ?

GOPA'RAV Hari Deshmukh, Judge of the Court of Small Causes at Ahmedabad, submitted, for the consideration of the High Court, the question—

“Whether a Brahmin woman who has contracted a marriage with a man of that caste during the lifetime of her first husband, and without his consent, is entitled to maintenance ?”

The Judge remarked : “The parties are Sompurá Brahmins who now follow the trade of stone-cutters. It appears from the evidence that *nátrás* or remarriages are allowed among them. The plaintiff, Khemkor, was married to Ranchhor, while her former husband was alive, and without obtaining his consent * * *

“The defendant is the deceased Ranchhor's son by another wife. He argues that as she is not a legal wife of his father she cannot claim maintenance.

“The plaintiff states that she has a right to maintenance, even if she be not a legal wife. In support of this, the following authorities are quoted :—West and Bühler's Digest, Book I., page 108, question III. ; also page 93, remarks on question 41.

“I think the plaintiff cannot be considered a legal wife, as her marriage was not celebrated in accordance with the custom of her caste. But she must be viewed in the light of a concubine, and as such she is entitled to maintenance from the property of the deceased.”

1873. The question was considered by WESTROPP, C.J., and
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WESTROPP, C. J. :—We concur in the opinion of the Judge of the Court of Small Causes at Ahmedabad, that the plaintiff Khemkor, cannot be regarded as the lawful wife of Ranchhor Pánáchand, she having married him in the lifetime of her first husband without the consent of that husband. We reserve our opinion as to whether, even if he had given his consent to her marriage to Ranchhor, such a circumstance would have validated that marriage : see *Reg. v. Karsan Gojá (a)*.

We also agree with the Judge in thinking that as the mother of the illegitimate children of Ranchhor, *i.e.*, as his concubine, she is entitled to maintenance. (1 Stra. H. L. 174; 1 West and Bühler, pp. 92, 93.)

[APPELLATE CIVIL JURISDICTION.]

July 29.

Referred Case.

PAVA' NA'GA'JI..... *Plaintiff and Appellant.*
 GOVIND RA'MJI *et al.*.....*Defendants and Respondents.*

Interest—Promissory Note—Penalty—Act XXVIII. of 1855.

Where a promissory note stipulated that, in default of payment of principal within three months after date, interest should run at the rate of 75 per cent. per annum, the increased rate was held to be a penalty and relieved against on payment of interest at 9 per cent. per annum notwithstanding Act XXVIII. of 1855.

Motaji Ratnaji v. Shekh Husen, 6 Bom. H. C. Rep., A. C. J. 8, followed; and *Arulu Mastry v. Wakuthu*, 2 Mad. H. C. Rep. 205, and *Braro Kishore Roy v. Madhub*, 17 Calc. W. R. Civ. R. 373, dissented from.

THIS was a reference from W. M. P. Coghlan, District Judge of Tanna. The facts fully appear from the following judgment of the District Judge :—

“ The issue for decision is whether the plaintiff is entitled to the full amount of interest claimed ?

“ My finding on the issue is, the plaintiff is entitled only to interest at 9 per cent. per annum from the date on which interest commences to run under the bond.

(a) 2 Bom. H. C. Rep. 124.

To be substituted for pages 383 to 386 of
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centum per annum in default of payment of any instalment. The High Court, on reference of the case, held (following *Rasáji v. Sayáná* (b) decided on the same day) that the increased rate of interest was a penalty to be relieved against on payment of interest at the rate of 9 per cent. from the time when each instalment became due.

"This doctrine must be followed in this Presidency while the above-mentioned cases are not overruled.

"Both the Madras and Bengal High Courts proceed on a different rule.

"In *Arulu Mastry v. Wakuthu* (c) it is ruled that in a bond, which stipulated for the payment of principal and interest at a certain rate within six months from the date of the bond, and that in default the rate of interest should be raised to six and a quarter per cent. per mensem, the higher rate of interest was not in the nature of a penalty, and that the plaintiff had a right to enforce payment thereof; for, said the Court (Scotland, C.J., and Phillips, J.), 'There is no ground for treating the higher interest as a penalty, in the legal sense of the term; and in this case considerations as to the probable motives, and calculations, in the contemplation of the parties when the bond was entered into, cannot be allowed to affect in any way the contract right secured to the plaintiff in express terms.'

"Again, the Bengal High Court (of which Court, be it marked, COUCH, C.J., who with NEWTON, J., gave judgment

(a) 6 Bom. H. C. Rep. A. C. J. 8. (b) *Ibid.* 7.

(c) 2 Mad. H. C. Rep. 205.

1873. in *Motoji Ratnáji v. Shekh Husen*, is now the Chief Justice) has held in *Brojo Kishore Roy v. Madhub* (d), under date 4th January 1872, that the Court was bound to give effect to the contract entered into between the parties, and that as the parties distinctly stipulated that, in the event of a failure to repay the amount advanced with interest on a particular day, the lender was to be entitled to interest at a different rate, the Court was not authorized to say as a matter of law that such stipulation is to be regarded as a penalty. I am asked to submit this question to the High Court under Sec. 28 of Act XXIII. of 1861. I have doubted the propriety of doing so, on the ground that our present precedent *Motoji v. Husen* is itself a decision on a referred case. But, considering the recent Bengal ruling to the contrary, and the great importance of the law being quite clear on this subject, I determined to submit the matter to the High Court. I am encouraged to do so by the fact that Chief Justice Couch presides over the Court from which the recent decision contrary to *Motoji Ratnáji v. Shekh Husen* has issued, and that neither of the learned Judges who decided *Motoji Ratnáji v. Shekh Husen* is now on the High Court Bench.

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"I have found on the issue in conformity with the High Court's ruling in *Motoji Ratnáji v. Shekh Husen*; but my own opinion (which is required by Sec. 28 of Act XXIII. of 1861) is, that a stipulation in a bond for payment of interest from a fixed date, in default of the payment of principal as covenanted, is not of the nature of a penalty from which a defendant may be relieved."

The reference was considered by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J.

WESTROPP, C.J.:—This Court, acting upon the rule *stare decisis*, abides by the decisions of COUCH, C.J., and NEWTON, J., in *Rasáji v. Sayána* (e) and *Motoji Ratnáji v. Shekh Husen* (f). The latter of those cases is precisely in point in the present case. The case of *Arulu Mastry v. Wakuthu* (g),

(d) 17 Calc. W. Rep. Civ. R. 373. (e) 6 Bom. H. C. Rep. A. C. J. 7.

(f) *Ibid.* 8.

(g) 2 Mad. H. C. Rep. 205.

quoted by the District Judge, was decided in 1864. The above decisions of the High Court of Bombay were made in 1869, and were not quoted in the case of *Brojo Kishore Roy v. Madhub* (h), cited by the District Judge. That case was decided in 1872 by L. JACKSON and MITTER, JJ., who mention a decision in *Boley Dobey v. Sideswar* (i), which would tend to show that the Judges of the High Court at Calcutta are not unanimous upon the question. The District Judge seems to think that, in some way or another, Sir RICHARD COUCH, who decided the two Bombay cases abovementioned, must be regarded as now holding the opposite doctrine, because he was Chief Justice at Calcutta when the decision in *Brojo Kishore Roy v. Madhub* (supra) was made. But we fail to see how he can be regarded as in anywise responsible for that decision. There is nothing in the report of it to show that he was consulted about that case by the Judges who made the decision, or that he was in anywise cognizant of it. We see nothing in the cases at Madras and Bengal to lead us to the opinion that it is necessary or desirable that we should depart from the doctrine laid down in this Court by COUCH, C.J., and NEWTON, J. We have not overlooked Act XXVIII. of 1855. We see no reason for believing that the Legislature had any intention of destroying the equitable jurisdiction of our Courts to relieve against a penalty : *Seton v. Slade* (j) ; 2 Wh. and Tud. 384, 785, 787, 1st Ed. The Act (XXVIII. of 1855) was intended to repeal the positive enactments then existing against usury. It has been frequently held in this Court that the Hindú rule of *dámdupat* is not affected by that Act : *Dhondú Jagannáth v. Náráyan* (k) ; *Khushálchand Lálchand v. Ibráhim Fakir* (l) ; *Hákmá Mánji v. Meman Ayab* (m) ; *Náráyan v. Satváji* (n) ; and *Pándurang Ganesh v. Krishnaráv Anant* there mentioned, page 85. We do not know of any better reason for supposing that the equitable doctrine, under which penalties have been relieved against, has been taken away by that Act, than there was for holding that the Hindú rule of *dámdupat* was thereby extinguished.

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(h) 17 Calc. W. Rep. Civ. R. 373. (i) 4 Beng. L. R. Apx. 94.

(j) 7 Ves. 265, 273. (k) 1 Bom. H. C. Rep. 47. (l) 3 *Ibid.* A. C. J. 23, 25.

(m) 7 *Ibid.* O. C. J. 19. (n) 9 *Ibid.* 38.

1873.
December 19.

[ORIGINAL CIVIL JURISDICTION.]

L.R. 5 Bom. 297.

Referred Case.

DA'DA'BHA'I HUSSANJI *Plaintiff.*

KUVARBA'I *Defendant.*

Small Cause Court—Jurisdiction—Possession—Landlord and Tenant—Act IX. of 1850, Sec. 91—"Without leave of the owner."

Upon a summons issued under Sec. 91 of Act IX. of 1850 by the Judge of the Small Cause Court to the occupier of a house to show by what title he claims to hold or occupy the same or part thereof:—*Held*, that the jurisdiction of the Small Cause Court is not ousted by the occupier appearing and showing as cause that which does not amount to an allegation of title on the occupier. *Held also*, that the words in that section, "without leave of the owner," comprise a case where the original possession was with leave of the owner, but was afterwards withdrawn by his vendee, the subsequent owner.

THIS was a case stated for the opinion of the High Court by N. Spencer, Second Judge of the Bombay Court of Small Causes, under Sec. 55 of Act IX. of 1850.

"This is a summons issued under Sec. 91 of Act IX. of 1850, requiring the defendant to show cause, why she should not quit and deliver up to the plaintiff possession of the first floor of a certain house.

"In 1865, Navroji Hussanji, the brother of the plaintiff, who is a merchant trading in China, while on a temporary visit to Bombay, entered into a contract to purchase the house in question. At that time Navroji and his family occupied a part of the house as tenants. The defendant Kuvarbái is the wife of Navroji Hussanji.

"The conveyance of the house to Navroji Hussanji was not executed until the 17th of June 1865, after he had left for China.

"On his departure Navroji Hussanji appointed his brother, the plaintiff, his agent for the management of his property

“ After the conveyance to Navroji Hussanji was executed, all the occupants of the house, including his family, vacated it; and his brother, as his agent, spent a considerable sum in repairing the house. The repairs were completed in 1866.

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“ During this time the plaintiff, by direction of Navroji, paid his wife, the defendant, an allowance of Rs. 100 a month for the maintenance of herself and family, and Rs. 30 per month as house-rent.

“ When the repairs to the house were completed, the plaintiff, as the agent of his brother, put the defendant, Kuarbái, and her children, in possession of the portion of the house from which it is now sought to eject them; and from that time ceased to pay her the allowance for house-rent.

“ In April 1866 the plaintiff himself left for China, and Navroji Hussanji appointed another agent to pay the allowance of Rs. 100 to his wife, who continued to act as his agent for four years. During this time he paid Kuarbái the allowance, and arranged for the letting of the portion of the house that was not occupied by Navroji's family; he received the rents from the tenants, and accounted for them to Navroji.

“ In 1869 Navroji Hussanji's agent had a disagreement with the defendant Kuarbái, and refused to continue to act as his agent.

“ As Navroji Hussanji was unable to induce any other person to undertake the management of his property, he authorized his wife, the defendant Kuarbái, and his sons, to receive the rents and appropriate them towards the maintenance allowance of Rs. 100 per month; and directed Náná-bháí Nasarvánji to make up the deficiency in the event of the rents falling short of that sum.

“ On the 5th March 1873, Navroji Hussanji, for good and valid consideration, sold and conveyed the house to his brother Dádábhái Hussanji, the plaintiff in this case. Navroji Hussanji has returned to Bombay.

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"The tenants who occupy the house now pay rent to the plaintiff; the plaintiff has called upon the defendant to quit and deliver up possession to him of the portion of their occupation.

"The annual value of the premises does not exceed the pecuniary jurisdiction of this court.

"Navroji Hussanji, the vendor, is willing that the plaintiff should be put in possession of the premises; but his wife, the defendant Kuvarbái, refuses to quit on the ground that when her husband purchased the house he intended to make a settlement of it for the benefit of herself and her children.

"I held that the defendant was an occupier of the premises within the meaning of Sec. 91 of Act IX. of 1850; that she came into possession under the party from whom the plaintiff claims his title, as a permitted user: *Hurry Money Dossee v. Gopal Chunder Mookerjee (a)*, and that permission having been withdrawn, she should deliver up possession.

"I, therefore, gave a verdict for the plaintiff, subject to the opinion of the High Court on the following question: Has the Small Cause Court, under the circumstances above set forth, jurisdiction to put the plaintiff in possession of the premises under Sec. 91 and following sections of Act IX. of 1850?"

The case was argued before WESTROPP, C.J., and BAYLEY, J.

Latham for plaintiff: —The question here is whether the Small Cause Court can, under Sec. 91 and following sections of Act IX. of 1850, put the plaintiff in possession of the upper rooms of the house: 9 and 10 Vic., ch. 95, s. 122; *Fearon v. Nowall (b)*. "Show cause" means show good cause. A mere claim of title is not sufficient: *Lilley v. Harvey (c)*, *Lloyd v. Jones (d)*, *Emery v. Barnett (e)*.

(a) 2 Taylor and Bell 57.

(b) 17 L. J. N. S. 1619 B. S. C. 5 Dow. & L. 439.

(c) 17 L. J. N. S. 3579 B.

(d) Ibid. 206 C. P.

(e) 4 C. B. N. S. 423.

Jackson, contra, for defendant:—The Judge of the Small Cause Court has not decided whether or not there was a *bonâ-fide* contest as to title. There is the finding that the husband of the defendant had an intention of settling the house upon her. By the mere fact of the defendant showing cause to the contrary of the summons, under Sec. 92, the Small Cause Court had no further jurisdiction. All the English cases cited are cases wherein the relation of landlord and tenant existed between the parties. Sec. 91 applies only to persons without any title whatever.

WESTROPP, C.J.:—In this case, submitted to us by the Second Judge of the Court of Small Causes, he asks whether, under the circumstances set forth in his statement, the Court of Small Causes had jurisdiction, under Sec. 91 of Act IX. of 1850 and the immediately following sections, to put the plaintiff into possession of premises within the pecuniary jurisdiction of that Court. To that question we must reply in the affirmative. We are not to be understood, therefore, as holding that if there had been a *bonâ-fide* question of title raised by the defendant, the Small Cause Court would have had jurisdiction under Sec. 91 of Act IX. of 1850 *et seq.* But the defendant's allegation, as stated to this Court by the learned Judge, was that "when her husband purchased the house he *intended* to make a settlement of it for the benefit of herself and her children." That does not, in our opinion, amount even to an allegation of title. It is no assertion of an agreement or contract or trust or other legal or equitable liability to convey to, or hold the premises for the benefit of the defendant, Kuvarbái, and her children. But it may be said, she and her children having originally entered upon the occupation of the rooms, the subject of this case, with the permission of her husband, who was then the owner, cannot be said to hold or occupy "without leave of the owner," and that it is not pretended that they hold or occupy under any lease or agreement which has been ended or duly determined by a legal notice to quit, and, therefore, they do not come within the jurisdiction given to the Small Cause Court by Sec. 91 of Act IX. of 1850.

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1873. However, we are of opinion that the words "without leave
 DA'DA'BHA'I of the owner" are not confined to the case of an original
 HUSSANJI entry without leave, but also comprise a case, such as this,
 v. in which the leave once granted by the original owner has
 KUVABBA'I. been withdrawn by the present owner, who derives title
 under him—a view of the section which was expressed by
 PEEL, C.J., in *Hurry Money Dossee v. Gopal Chunder Mooker-
 jee* (f). No doubt his dictum to that effect was extra-judicial
 but it is nevertheless of great weight and commends itself
 to our minds; and we think we should mischievously, and
 without sufficient reason, narrow the construction of Sec. 91,
 were we to limit it in the manner in which the argument
 for the defendants would necessitate, viz., to an absence of
 original leave.

Attorneys for the plaintiff: *Shapoorjee and Thakurdass.*

Attorneys for the defendant: *Jefferson and Payne.*

(f) 2 Taylor & Bell 57.

[ORIGINAL CIVIL JURISDICTION.]

1873.
December 19.ALLA'BAKHIA' SHIVJI *Plaintiff.*JEHA'NGIR HOEMASJI..... *Defendant.**Arbitration—Award—Correction of obvious error—Civ. Pro. Code, Sec. 327.*

Upon a motion to amend an award, filed under Sec. 327 of the Civ. Pro. Code, on the ground of obvious errors contained in it, *it was held* that the Court had no power, under Sec. 327, to amend an award or remit it for the re-consideration of the arbitrators, but has only the power to file and enforce the award or reject it.

IN this case *Macpherson* for the plaintiff moved before BAYLEY, J., for an order that an award, dated the 28th of June 1873, made in this matter, by the arbitrator Nasarvánji Ardesir Wadia, be amended in the particulars set forth in the affidavit of Allárahíá Shivji the plaintiff, and that judgment should pass on the award either as amended, or in its original terms, as to the Court should seem fit; and contended that the Court had power to refer the award back to the arbitrator: *Mordue v. Palmer (a)*.

The Honourable A.R. Scoble, Advocate General, opposed the application to modify the award, and contended that the Court had no power under the Civil Procedure Code to do otherwise than enforce the award, or to refuse to pass a decree.

Macpherson, in reply, relied on the inherent power of the Court as a Court of Equity.

BAYLEY, J.:—I do not see how I can go beyond the Code; this is an important point; and as there is no appeal, I think the matter should be argued before two Judges.

The motion to amend the award was accordingly called on before WESTROPP, C.J., and BAYLEY, J., on 18th December 1873.

(a) L. R. 6 Ch. App. 22.

1873. The plaintiff and defendant were partners in 348 shares in the Albert Mills Co., Limited; there was a difference existing between them with regard to those shares which consisted of two sets—one of 225, the other of 123.

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The 225 shares had been purchased at Rs. 1,575 per share. The other shares were bought, during the partnership, in unequal portions by the members of the partnership, and were, for the purposes of the award, estimated by the arbitrator at Rs. 1,050 each in value.

The plaintiff, in his affidavit, said that the arbitrator had intended to divide the whole 348 shares equally between him and the defendant, as regarded cost as well as number, but had by mistake charged the plaintiff with a greater number of the 225 shares, which were the more expensive set.

The second error alleged was that, as appeared from the award itself and the schedule annexed to it by the arbitrator, he had intended to award to the defendant only Rs. 8,650 out of Rs. 12,500 claimed by him. The arbitrator, in endeavouring to carry his intention into effect, rightly debited the plaintiff with Rs. 8,650, but erroneously credited the defendant with Rs. 4,325 and thereby wrongly charged the plaintiff in account with Rs. 12,975 instead of Rs. 8,650.

The arbitrator said in his affidavit that he was convinced that he had made errors in principle in his award, but did not state any particulars.

Macpherson for the plaintiff :—There are two obvious errors in the award, which may be amended without affecting the decision which the arbitrator intended to make : see Sec. 322 Civ. Proc. Code. The word “enforced” in Sec. 327 empowers the Court to apply Secs. 322, 323, 324, 325, to awards filed under Sec. 327—Sec. 321 is expressly confined to references by the Court. Secs. 322, 323, 324, are not so. This award being filed under Sec. 327, without drawing the attention of the Court to the objections, does not amount

to a waiver of the objections, the Court not being able to entertain the objections till the award was filed, it would be a hardship that we could neither sue afresh nor have the award corrected. It is the Court that under Sec. 327 should give the notice, not the party seeking to file the award. The fact of mistake existing in the award would be no objection to its being filed; and in a motion for correction of the award our opponent would have an opportunity of resisting an application for amendment: Russell on Awards 296, 3rd Ed. A Court of Equity will, in a case of admitted mistake by the arbitrator, refer back the award: *Mills v. The Master & Society of Bowyers* (b).

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The Advocate General :—After arguing that one of the errors was improbable, proceeded to say that, even admitting the other to be an obvious error, it did affect the decision, and therefore even if the Court have the power of amendment under Sec. 322, such an error could not be amended. But further, assuming that in awards made under an order of reference, or under Sec. 326, such an amendment as here sought for could be made, it cannot be made in cases under Sec. 327. In Sec. 326 there is a special proviso which is wanting in Sec. 327. Parties who wish to impeach an award, sought to be filed under Sec. 327, should do so within the time named by the Court for showing cause against the filing of the award. Here the party, who alleges the award to be wrong, is the petitioner who has caused it to be filed. He in his petition, under Sec. 327, did not allege any error in the award; it was now, therefore, too late to ask for the amendment, the award was filed without objection; *non constat* that it would have been so, if the alleged error had then been stated. Sec. 327 does not provide for the filing of the proceedings. As to the meaning of the word "enforced" he referred to Secs. 200, 201; and to Russell 9th Ed. 288 as to mistakes.

1873. *Macpherson* in reply:—Secs. 200 and 201 relate to decrees
 ALLAH'RAKHIA' and have no bearing here, and enforcement there means a
 SHIVJI different thing; previously to decree the Court considered
 v. the matter, and the right of appeal exists. Sec. 325 is to be
 JEHA'NGIR looked upon as showing what "enforcement" is. Sec. 327
 HORMASJI. is silent as to passing judgment on the award, but it is admitted that we are entitled to judgment on the award under Sec. 325. Sec. 326 required a particularity of language, which Sec. 327 did not. There is no proviso for filing the award under Sec. 326.

WESTROFF, C.J.—The first error, which the plaintiff seeks to have corrected, is not manifest on the face of the award itself, and is not stated by the arbitrator in his affidavit to exist. The arbitrator, in that affidavit, said that his award contained errors in "principle," but he has not stated what they were, so that he has not thrown any light upon the case. His attorney's letter speaks of "an error," but does not show what it is. So far then, as the first error is concerned, it is not an obvious one within the meaning of the 322nd section of the Civil Procedure Code, supposing that the Court had power to apply that section, as to the amendment of obvious errors, to awards filed under Sec. 327. The other error appears to us to be obvious. The manner in which the accounts have been made up by the arbitrator resulted in the plaintiff being charged with a sum half as large again as was intended. But whether it was an obvious error, which affected the decision, we do not, for the following reasons, consider it necessary to decide :—We have perused Secs. 312 to 327, and have come to the conclusion that in the case of awards filed under Sec. 327, which is a clause distinct in itself, we have no power to make amendments. Whether the Court has power, in cases under the other sections, to make such amendments as those sought here, it is not now necessary to say. Under Sec. 327 we are of opinion that we have no power to amend an award or to remit it for the re-consideration of the arbitrators. Secs. 312 to 321

refer to awards made on orders of reference from suits pending in Courts. Sec. 322 has nothing *in itself* which would induce us to apply it to any other than awards under a reference from the Court. Nor has Sec. 323, as the same class of awards are treated of in that section. As to Sec. 324, which says :—"No award shall be liable to be set aside except on the ground of corruption or misconduct of the arbitrators or umpire," it is not perhaps now actually necessary for us to decide whether it would apply to an award under Sec. 327. We do not, however, hesitate to say that, in our opinion, it would not. Sec. 327 gives the parties a certain time within which to show cause against the filing of an award, and, if corruption or misconduct of the arbitrator or umpire existed, it should be shown as cause, and, if established, the Court would refuse to file the award. Sec. 325 applies to awards made under an order of reference made by the Court.

Sec. 326 applies to submissions (in writing) to arbitration made out of Court, but which the Court, on the application of the parties or any of them, if sufficient cause to the contrary be not shown, may direct to be filed in Court. When filed, the Court may found an order of reference to arbitration upon such a submission. Then follows a proviso rendering the previous provisions of Chap. VI applicable "to all proceedings" made under such an order of reference, and "to the award," and "to the enforcement of the award."

Sec. 327, under which the present case comes, provides :—

"When any matter has been referred to arbitration without the intervention of any Court of Justice, and an award has been made, any person interested in the award may, within six months from the date of the award, make application to the Court having jurisdiction in the matter to which the award relates, that the award be filed in Court. The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring such parties to show cause, within a time to be specified, why the award should not be filed. The application shall be numbered and

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1873. registered as a suit between the applicant as plaintiff and the
ALLA'RAKHIA' other parties as defendants. If no sufficient cause be shown
SHIVJI against the award, the award shall be filed, and may be
v. enforced as an award made under the provisions of this
JEHA'NGIR chapter.'"
HORMASJI.

There is not, in that section, a word about the previous provisions of Chap. VI. being applicable to the award itself, but only a simple direction that the award may be enforced as an award made under the provisions of that chapter. Power to amend an award cannot be implied from a mere power to enforce it. It appears that the only authority the Court has under that section is to file and enforce an award or to refuse to file it, and to leave the applicant to bring a common action upon it, if such be his pleasure. No doubt if sufficient cause were shown, as, for instance, corruption or misconduct of the arbitrators or umpire, as above mentioned, the Court would refuse to file it. The Court must limit itself to the special procedure contemplated by this section, which contains no provision for amending awards. On the contrary, a comparison of Sec. 327 with the one immediately preceding it leads to the presumption that the Legislature did not intend to confer any power of amendment where awards are filed under Sec. 327. As to costs in the present case, we think that, as there is no doubt a considerable mistake in the award to the disadvantage of the plaintiff, and as the question is of importance, and has been raised now for the first time, each party should bear his own costs of this application. Judgment we now pass according to the award.

Attorneys for the plaintiff: *Hearn, Cleveland, and Peile.*

Attorneys for the defendant: *Manisty and Fletcher.*

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 325 of 1872.*1873.
July 29.SURBHA'I DAYA'LJI *Appellant.*RAGHUNA'THJI VASANJI *et al.* *Respondents.**Code of Civil Procedure—Appeal—Limitation—Act IX. of 1871, Sec. 5—
Discretion to admit time-barred appeal—Power of High Court to interfere
with the discretion.*

The circumstance that a respondent who has taken, or intended to take, objections, under Sec. 348 of the Code of Civil Procedure, to the decree of the Court of first instance, at the hearing of an appeal already preferred by his opponent, has been prevented by the withdrawal of the appeal from having his objections heard, does not constitute a sufficient cause for admitting a cross appeal by such respondent after the prescribed period, Act IX. of 1871, Sec. 5.

The High Court may consider and determine upon the sufficiency of the reasons which a Judge has given for admitting an appeal after the lapse of the period limited for that purpose by law.

Mowree Beiva v. Soorundarnath Roy, 10 Calc. W. Rep. Civ. R. 178, followed.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of the District of Surat, delivered on the 22nd June 1872, reversing the decree of the Extra Subordinate Judge of Surat.

The special appeal was heard by MELVILL and WEST, JJ.

Pándurang Balibhadra for the special appellant.

Dhirajlál Mathurádás, Government Pleader, for the special respondents.

The facts sufficiently appear from the following judgment :—

PER CURIAM :—In this case the District Judge admitted an appeal by the defendants more than ten months after the date of the decree of the Subordinate Judge. The reason, assigned by the District Judge for so doing, was the following :—'The plaintiff had filed an appeal against a portion of

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the decree, and the defendants had intended to take objections to another portion of the decree under Sec. 348 of the Civil Procedure Code. On the day of hearing, however, the plaintiff withdrew his appeal, and the defendants were thereby deprived of the opportunity of filing their objections and obtaining a decision thereon. We cannot agree with the District Judge that this result constituted a sufficient cause for the non-presentation of an appeal within the period prescribed by law. As was observed in *Jaitu v. Balu* (a) a respondent should file a cross appeal "if he desires to secure the right of asking for a decision on his objections irrespective of the contingency that the appeal, filed by the opposite party, may not come to a hearing." If, from a desire of obtaining justice more cheaply, or of securing a longer time for deliberation, or for any other reason, he prefers to await the hearing of an appeal, filed by his opponent, before he makes his own objection, he must run the risk of the opportunity, which he waits for, never being presented to him.

It has been contended that this Court has no power to interfere with the exercise of the discretion of the District Court, which was satisfied with the sufficiency of the reason put forward by the appellants for their delay. We are of opinion, however, that we have power to interfere when such discretion is exercised without any proper legal material to support it. In the present case, the reason, given by the District Court for the admission of the appeal, is one which, in our opinion, is not a legal or valid reason, and we must, therefore, treat the admission of the appeal as an error in law. This view is in accordance with that taken by the Calcutta High Court in *Mowree Bewa v. Soorundarnath Roy* (b).

Reversed and Decree of Subordinate Judge restored.

NOTE.—See Act VIII. of 1859, Sec. 102, which section is applicable also in appeals. See Act XXIII. of 1861, Sec. 37.—*Ed.*

(a) 3 Bom. H. C. Rep. A. C. J. 81.

(b) 10 Calc. W. Rep. Civ. R. 178.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 403 of 1872.*1873.
July 21.SA'VALGIA'PA' VIRBASA'PA' *et al.*.....Appellants.

BASVANA'PA' BASA'PA'Respondent.

Possession—Prescription—Right of Way—User.

A, being out of possession and excluded from the use of a piece of ground for a longer period than six months, sues *B*, who is in possession, to establish a right of way:—

Held that *A* must prove either thirty years' user, or a grant by the owner of the ground, for the possession itself constitutes a title against any person failing to prove a better.

THIS was a special appeal from the decision of A. L. Spens, Judge of the District of North Kanara, reversing the decree of the Subordinate Judge of Sirci.

The plaintiff sued the defendants for a right of way, complaining that the latter prevented him from carrying grass by a lane by which he had been in the habit of carrying it for eighteen or twenty years. The Court of first instance decreed against the claim, holding that the plaintiff had not acquired a prescriptive title. This decree was reversed in appeal on the ground that "the defendants have not proved that the ground * * * belongs to them. There is no evidence to this effect. There is evidence to the contrary, viz., the defendants' own title deeds, which to my mind clearly show that this lane forms no portion of their purchase, and does not belong to them * * *. On the other hand, the plaintiff has clearly shown, and the fact is not disputed, that the plaintiff has made use of this lane for the last eighteen or twenty years. It seems to me, therefore, under the circumstances, extraordinary that the plaintiff should be prevented from using the road by a man who has no authority to prevent him, simply because the plaintiff has not lived long enough to make use of the road for thirty years."

The special appeal was heard by MELVILL and WEST, JJ.

v.
BASVANAPPA
BASAPPA.

Chunilal Maniklal for the appellants.

Shamrao Vithal for the respondent.

PER CURIAM :—The defendants having been in possession and the plaintiff having been out of possession, for a longer period than six months, the plaintiff must prove his title. In order to establish his right of way, he must prove either thirty years' user, or a grant by the Government, whom he declares to be the owners of the ground. It has been found, by the Courts below, that he has not established the first; and his pleader has failed to point out to us any evidence which could possibly be held to establish the second. The District Judge has found that the defendants have failed to prove their title to the ground; but their possession is in itself sufficient to constitute a title against any person failing to prove a better title.

District Judge's decree reversed and Subordinate Judge's decree restored with costs throughout.



[APPELLATE CIVIL JURISDICTION.]

July 2.

Miscellaneous Special Appeal No. 26 of 1872.

GANPATLA'L ANUPRA'M *et al...* Plaintiffs and Appellants.

SAMPATRA'M GHELA'BHA'I... *Defendant and Respondent.*

Hereditary Officer—Act XI. of 1843, Sec.13—Official emolument of a Watandár—Its liability to Civil Process.

The official remuneration of the officiating hereditary officer is not liable to civil process so long as it is in the hands of the Collector or other disbursing officer; but as soon as it is in the hands of the hereditary officer himself, it is deprived of any special protection.

THIS was a miscellaneous special appeal from an order of F. D. Melvill, Judge of the District of Ahmedabad, amending an order of the Subordinate Judge of Neriad.

The facts of the case are briefly these :—

The plaintiffs and the defendant are hereditary officers in receipt of allowances called Amin Sukhdi, Jivak, and Sānth. The defendant, as officiating officer, drew the full amount of the allowances; but, declining to give to the plaintiffs any portion thereof, the latter filed a suit in 1861, and obtained a decree which gave judicial sanction to the terms of a compromise entered into between the parties. Those terms were that Rs. 82 should be paid by the defendant to the plaintiffs year by year from the amount paid by the Government in respect of the three allowances, and that in case of any increase or decrease being made by the Government in the amount of the allowances, a proportionate increase or decrease should be made in the annual amount payable to the plaintiffs. In the year 1866, the Government—having, through the instrumentality of the *watan* commission, reorganized these hereditary offices, on the principle of providing for the salaries of the officers by a percentage calculated upon the Amin Sukhdi, of retaining efficient officers, and of replacing inefficient ones by ordinary clerks—maintained the defendant in his office on a fixed salary of Rs. 504 per annum. This being a larger sum than what had been allowed under the former arrangement, the plaintiffs now claimed a proportionate increase as awarded by the decree in their favour. The defendant contended that the nature of the allowance was completely altered by the new arrangement under which the plaintiffs could not even claim the 82 rupees awarded in their decree.

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The Court of first instance allowed the decree to be executed, as prayed for by the plaintiffs, on the ground that the increase allowed by the Government formed part of the hereditary allowance called Amin Sukhdi. The District Judge on appeal concurred in this view, but he held that the decree could not, as to the greater portion of the annual payment which it prescribed, be enforced against the defendant, such payment being intended to be made and received out of a salary protected against civil process by Sec. 13 of Act XI. of 1843.

1873. The special appeal was heard by WEST and NA'NA'BHA'I
 GANPATLA'L' HABIDA'S, JJ.
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 v.
 SAMPATRA'M Shántárám Náráyan and Nagindás Tulsidás for the ap-
 GHELA'BHA'I. pellants.

Dhīrajāl Mathurádas, Government Pleader, appeared for the special respondent.

PER CURIAM :—We agree in this case with the view taken by the Courts below of the nature of the payment enjoyed by the defendant Sampatrám. The settlement of *watans* in Guzerat has not deprived the allowances, paid to *watandár* office-holders, of the character they formerly had. The settlement, indeed, rests on Act XI. of 1843, Sec. 13, expressly devised for the preservation of *watans* in such a state as to enable them to afford a remuneration for the services they were meant to provide for. Rules made to secure really efficient service, and for the supersession of those *watandárs* who should not be able to render it, are not to be regarded as taking the *watandárs* and their estates out of the Act, but rather as providing a means by which the Act is to be made to operate upon them with additional efficacy.

The defendant, it appears, receives under the new arrangements an official salary or allowance of Rs. 504 a year. This exceeds considerably the annual amount, upon which the sum of Rs. 82, which he formerly agreed to pay annually to the plaintiffs, was calculated. The plaintiffs claim, according to the terms of the compromise embodied in the decree, of which they seek execution, that the annual amount payable to them shall be increased from the time that Sampatrám's total allowances increased, so as to maintain the original proportion of payment to emoluments. The District Judge has held that, although this was no doubt the agreement between the parties, yet the increased salary and the whole salary received by Sampatrám being a *watan* allowance is protected by Act XI. of 1843, Sec. 13, against liability for the present claim. In one sense, no doubt, it is protected. The salary could not be attached by the plaintiff

any more than by other creditors in the hands of the Collector or other disbursing officer, who would ordinarily pay it to Sampatrám. But once in his hands, it is deprived of any special protection. It blends with his other moneys and becomes undistinguishable. What the plaintiffs seek, indeed, is not a portion of Sampatrám's salary, as salary, but a sum of money, called by any name whatever, each year, bearing a certain proportion to Sampatrám's emoluments for that year. His personal obligation to pay this money is not extinguished by his being a *watandár*, though the *watan* cannot be attached; and the plaintiffs are entitled to enforce their decree free from the limitation imposed by the order of the District Judge. We modify his order accordingly. Costs on respondent. *

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Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 213 of 1873.

August 25.

KO'TARBASA'PA' *Plaintiff and Appellant.*

CHANVEROVA' *Defendant and Respondent.*

'Stridhan'—Hindu Widow's power of alienation—Immoveable Property.

A Hindu widow, on this side of India, has no power to alienate immoveable property if given to her by her husband in his lifetime, and thus becoming "Stridhan" in her hands.

THIS was a special appeal from the decision of Baron Larpent, Acting Judge at Dharwad, reversing a decree of the Subordinate Judge.

* NOTE.—An application to review this judgment was rejected by the Court on the 26th February 1874, on the ground that the arguments urged in support of it were substantially the same as those advanced at the hearing of the appeal. The ruling of the Court in this case is supported, by *Flarty v. Odleom* 3 Durn and E 681 and *Lidderdale v. Duke of Montrose* 4 Idem 248.—*Ed.*

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A Hindu, named Basápá, died, leaving, surviving him, two widows, viz., Ningavá the elder and Shivaka the younger, and a daughter, the defendant Chanverová by Ningavá. A posthumous son, the plaintiff Kótarbasápá, was born by Shivaka to Basápá three months after his death. As the two wives did not agree, Basápá, before his death, was alleged to have divided his property between them, and to have made a gift of the house in dispute to Ningavá, the elder wife. Subsequently, Ningavá, by an agreement, paid Rs. 200 to Shivaka, and agreed to occupy the house till her death, after which it was to pass absolutely to Shivaka.

The Subordinate Judge held the plaintiff's claim proved and gave a decree in his favour. In appeal, however, the District Judge threw out the plaintiff's claim on the ground that it was not competent to Ningavá to pass the agreement and thereby alienate her "Stridhan" to which after her death her daughter, the defendant Chanverová, was entitled to succeed under the Hindu Law. He observes in his judgment :—

"Exhibit 69 is a deed under which Basápá made a distribution of his property between his wives. The gift of the property to Ningavá, the elder wife, was absolute, and the terms of the deed are such as Basápá was competent to carry out between his two wives. Such an arrangement is valid by Hindu Law, and property so acquired by a wife ranks as "Stridhan," and would descend to the daughter, and not to the plaintiff, who is a son by the other wife. (Grady H. Law pp. 174, 175.)

"The question then is, whether the subsequent deed, the agreement made between the two wives, affects the defendant's right ?

"In this document Ningavá gives Shivaka Rs. 200, and it is agreed that Ningavá shall occupy the house during her life, and that after that it shall revert to Shivaka.

"I am of opinion that Ningavá had no power to enter into such an arrangement. * * * Under the Hindu Law, defendant has a clear right to inherit, and her mother could not deprive her of this right by executing such an agreement."

The special appeal was argued before MELVILL and PINHEY, JJ., on the 25th August 1873.

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Pānlurang Balibhadra for the appellant :—The plaintiff, being a son of Basápá, is alone entitled to the property. The widows are only entitled to maintenance. Besides, Ningavá passed the agreement to plaintiff's mother. A Hindu daughter has no vested interest like a son. She can inherit only under certain contingencies : 3 Cole. Dig. Bk. 573 (Edit. of 1851).

Shāntārām Nārāyan contra :—The husband, before the birth of the plaintiff, gave the property absolutely to his two wives, by the first of the two deeds, because they were quarrelling. A Hindu woman has no power to alienate immoveable property given to her by her husband : Stokes H. Law Bks. p. 100—10. *Doe d. Kullammál v. Kuppu Pillai (a)*; *Vijārangam v. Lakshuman (b)*.

MELVILL, J. :—The District Judge was right in refusing to give effect to the agreement between the two wives by which Ningavá alienated the house from her daughter, who would otherwise have inherited it as part of her mother's *Stridhan*. The *Mitákshará*, which governs this case, is wholly silent on the subject of the power of women to alienate their peculiar property ; but both the Bengal School of Law (see *Dáyabhág* Ch. IV., Sec. 1, pl. 21 to 23) and the *Vyavahár Mayukha* (Ch. IV., Sec. 10, pl. 9) prohibit the alienation by a widow of immoveable property which she has received from her husband. In the absence of any provision on the subject in the *Mitákshará*, we think we should be right in following the rule laid down by the other authorities.

We are, however, not satisfied with the District Judge's finding that the house was given to Ningavá by her husband Basápá. The District Judge has described the first agreement as a deed under which Basápá made a distribution of his property among his wives, and he seems to rest his finding upon this document alone ; but there is nothing in the document itself which proves that Basápá made the distri-

(a) 1 Mad. H. C. Rep. 85, 89.

(b) 8 Bom. H. C. Rep. O. C. J. 259.

1873. bution. It purports to be an agreement made by the two
 Ko'TARBA- wives, *inter se*.
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 CHANVEROVA' We think it necessary to direct the District Judge to re-
 record a fresh finding upon the whole evidence on the follow-
 ing issue :—

Is it proved that the house in dispute was given to Ning-
 avá by her husband Basápá ?

Case remanded.

[APPELLATE CIVIL JURISDICTION.]

October 9.

Special Appeal No. 351 of 1873.

GAMBHIRMAL and another *Appellants.*

CHEJMAL and another *Respondents.*

Stamp—Discretion—Appeal—Act XVIII. of 1869, Sec. 20.

A District Court refused to allow, under Act XVIII. of 1869, Sec. 20, an insufficiently stamped document to be admitted on payment of the full amount of stamp duty, and the penalty, on the ground that it was wilfully executed in fraud of the stamp law. *Held* that the High Court cannot in special appeal question the correctness of the District Court's refusal.

Pendse v. Málee (3 Bom. H. C. Rep. A. C. J. 94) commented on.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of A'hmada'bad, reversing the decree of Chintáman Hari Deshmukh, Subordinate Judge of Newásá.

The special appeal was argued before MELVILL and PINHEY, JJ.

Bhairavnáth Mangesh, for the appellants, contended that the Lower Court ought to have received the amount of de-

ficiency and penalty offered by the plaintiffs, in the absence
 of any allegation or evidence in the case that the plaintiffs
 intentionally or fraudulently accepted the document on an in-
 sufficient stamp, and cited *M. G. Pendse v. R. S. Malse* (a).

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Pándurang Balibhadra contra :—The present case differs
 from *M. G. Pendse v. R. S. Malse*. In this case the Dis-
 trict Court has distinctly found that the plaintiffs were a
 party to the fraud of the stamp law. In the case cited, the
 finding of the District Judge was that the omission was not
 intentional.

PINHEY, J.:—It is clear on the face of the plaint that the
 plaintiffs' claim is brought on the document, recorded in
 the case as Ex. No. 3. It must, therefore, stand or fall
 by that document which is stamped with a one-anna re-
 ceipt stamp, and was called by the plaintiffs throughout
 the case a receipt. At the head of the document, in the
 body of it, and at the foot of it, the document is des-
 cribed in Maráthi as being a *Pávati*, which means in English
 a receipt.

But the document is not in fact a receipt. It contains an
 express agreement to deliver $11\frac{1}{2}$ *khandis* of *zori* (grain).
 Sec. 5 of Sch : II of Act XVIII. of 1869 does not there-
 fore apply to it, and the District Court has, according, rightly
 ruled that this document is insufficiently stamped.

It was contended by the plaintiffs' pleader in this Court
 that, if the document was insufficiently stamped, his clients
 should be allowed to pay the sum required to make up the
 full amount of stamp duty chargeable on such instrument
 together with the penalty prescribed by Sec. 20 of Act
 XVIII. of 1869. But the District Court refused a similar
 application which was made to it on behalf of the plaintiffs,
 on the ground that the document was wilfully executed
 in fraud of the stamp law: and we cannot in special
 appeal say that the order in this respect was wrong. The
 District Court had the document before it, and from a perusal

1873. of it, and from a consideration of the words used in it, held
 GAMBHIRMAL that the parties thereto intentionally evaded payment of the
 v. proper duty. It was within the competence of the District
 CHEJMAL, Court to arrive at such a conclusion on a consideration of the
 document, and of any evidence which the parties might have
 chosen to submit on this point. Indeed, the law does not
 require the Court to find as a fact that evasion of stamp
 duty was intended when the document was executed. A
 Court may, under Sec. 20 of the General Stamp Act, refuse
 to allow a defect, as to stamp duty, to be remedied, unless
 it be proved affirmatively to its satisfaction that there was
 no intention to evade the payment of stamp duty. We can-
 not, then, in special appeal, question the correctness of the
 order of the District Court refusing to allow the plaintiffs to
 pay the sum required to make up the full amount of stamp
 duty chargeable on the document.

The decision in *M. G. Pendse v. R. S. Málse* has been
 pressed upon our attention ; but although that case is similar
 to this one in many ways, it is not on all fours with it, and
 it differs from the present case as to the very point noticed
 above. In *M. G. Pendse v. R. S. Málse*, the District Court
 held that there had been no intention to evade the stamp
 law ; but it refused to alter the order of the Court below
 which had, in the exercise of the discretion vested in it by
 law, refused to allow the deficiency of stamp duty to be sup-
 plied. In the present case, the District Court has found as
 a fact that the document was executed on an insufficient
 stamp for the purpose of evading the provision of the Gene-
 ral Stamp Act.

The decree of the District Court must therefore be con-
 firmed ; but as both the parties to the case appear to be *in*
pari delicto, we order the parties to bear their own costs in
 special appeal.

Decree confirmed.

[APPELLATE CIVIL JURISDICTION.]

*Small Cause Court Reference No. 124 of 1873.*1873
October 14.GENDU MALHA'RI *Plaintiff.*GOVIND ATMA'RA'M *Defendant.**Small Cause Court—Act XI., of 1865, Sec. 8—Jurisdiction—**Place of Dwelling.*

A servant residing within the jurisdiction of one Small Cause Court who has a family house within the limits of the jurisdiction of another Small Cause Court in which his father lives, and which he himself occasionally visits, does not dwell within the local limits of the latter Court within the meaning of Sec. 8 of Act XI. of 1865; and, although the cause of action may have arisen there, a suit against him will not lie in that Court.

THIS was a reference by Náráyan Balwant Bhise, Judge of the Small Cause Court at Yáwal, for the orders of the High Court.

The Judge stated the case as follows :—

“The defendant and his family have a common place of dwelling within the jurisdiction of this Court, but he has been residing, for some time prior to the filing of the suit, within the jurisdiction of another Court, and is in service there. Now, in this case, the question is, whether or not he shall be deemed to be residing at both places, and whether or not the suit is triable by this Court ?

“My opinion is that the defendant cannot be deemed to be residing at both places, and that, therefore, the suit cannot be tried by this Court.”

After referring to Act XI. of 1865, Sec. 8, and explanations (a) and (c), the Judge proceeded to say :—“Now, as regards the present case, the plaintiff has stated in his evidence that the permanent dwelling of the defendant and his family is at Sárda, within this Court's jurisdiction; that his father dwells there; that the cause of action has arisen within the jurisdic-

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tion of this Court ; that at the time when the cause of action arose, the defendant dwelt within this jurisdiction ; and that he comes to visit his father. Again, even if these facts be held to be true, still the plaintiff appears to have admitted in the same deposition as follows : That the last time when the defendant came to see his father he stayed for two days ; that four days after, this suit was filed ; that at the time when the plaintiff commenced this action, the defendant did not personally dwell within the jurisdiction of this Court, nor did he come into that jurisdiction after the suit was filed ; that the defendant has been personally working, *i.e.*, doing service at Násik, within the jurisdiction of another Court for the year previous to the time when the suit was filed, and that the defendant has been so working continuously for some time ; that he does not himself work for gain within this jurisdiction, neither by his servant nor agent, and that he dwells at present at Násik, where the cause of action did not arise.

“Under all these circumstances, I consider that the defendant dwells within the jurisdiction of another Court and personally works there ; and that, although the cause of action did not arise within that jurisdiction, the defendant should be deemed to reside within such jurisdiction and not within my jurisdiction. I, therefore, am of opinion that the suit is not triable by this Court, and I am confirmed in this view of the case by a decision of the Calcutta High Court in *Porgash Paray v. Hachim Khansamah* (a). However, as I have not found any such decision in the reports of cases decided by the High Court at Bombay, and feel myself doubtful whether or not my view of the case as stated is correct, I submit the case for the orders of the High Court.”

The reference was heard by MELVILL and PINHEY, JJ.

PER CURIAM :—It appears that the defendant's usual place of residence is not within the limits of the Court's jurisdiction, although he has a family house there in which his father lives, and which he occasionally visits. The Court thinks

(a) 7 Cal. W. Rep. Civ. R. 417.

that, under the circumstances, the Judge was right in holding that the defendant is not dwelling within the local limits of his jurisdiction within the meaning of Sec. 8 of Act XI of 1865.*

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Reply accordingly.

Act XI. of 1865, Sec. 8, Ex. a.—Where a person has a permanent dwelling at one place, and also a lodging at another place for a temporary purpose only, he shall be deemed to dwell at both places in respect of any cause of action arising at the place where he has such temporary lodging.

[APPELLATE CIVIL JURISDICTION.]

Application for the exercise of Extraordinary Jurisdiction, No. 33 of 1873.

Sept. 26.

KA'VASJI BHIMJI.....*Petitioner.*

DHONDIRAJ VINA'YAK by his agent VISA'JI...*Opponent.*

The Code of Civil Procedure, Sec. 338—Stay of execution of a decree.

When an Appellate Court reverses a decree in favour of the plaintiff in a suit, it ought not to stay execution of its own decree under Section 338 of Act VIII. of 1859.

Order of District Court staying execution under such circumstances set aside.

THIS was an application for the exercise of the Court's extraordinary jurisdiction.

Dhondiraj obtained a decree against Kavasji in the Court of the Subordinate Judge of Panwel, and, in execution of it, attached certain moveable property belonging to Kavasji. This decree was reversed by the Appellate Judge, Mr. Coghlan, who, however, on the application of Dhondiraj, ordered that execution of his own decree should be stayed for a period of

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ninety days from the date of that decree. On an application for the reversal of this stay order, MELVILL and PINHEY, JJ., granted a *rule nisi*.

The rule was argued by *Mánikshá Jehángirshá*.

Shántárám Náráyan (with him *R. S. V. N. Mandlik*) in showing cause, said :—There is no appeal against an order of this kind. Under Sec. 338 of the Code of Civil Procedure, an Appellate Court has undoubted power of staying execution of its own decree.

[MELVILL, J. :—But that decree reversed the decree of the court of first instance in the plaintiff's favor ; so there remained no decree to execute.]

The defendant can ask for restoration of his property only by virtue of the appellate decree ; in fact, he must present a *Darkhást* for its execution. If then the right to apply for execution undoubtedly belongs to the defendant, it also belongs to the plaintiff. The only conditions required by that section, preliminary to the issue of a stop order, are—1st, the showing of a sufficient cause, and 2ndly, giving of security for the due performance of the final decree. Suppose the defendant in this case were to take no measures for the recovery of the goods for over three years, and the decree of the superior courts is not passed for a dozen years, I presume he would be precluded from recovering them ever afterwards.

Mánikshá was not called on to reply.

MELVILL, J. :—The District Judge's order, staying execution of his own decree, is, at the best, a provisional order, capable of having effect only so long as the pleasure of this court is unknown. Whether, therefore, an appeal lies against such an order or not, it is our duty to set it aside, as soon as it is brought to our notice, if it appear to us to be an improper order. We are clearly of opinion that it is an order which ought not to have been made. The defendant was

entitled, as soon as the decree against him ceased to exist, to have his property released from attachment, and to be restored to his original position. The plaintiff, having lost his decree, is in no better position, until his special appeal is decided, than a plaintiff before judgment. He would not be entitled to have the defendant's property attached before judgment, unless he were to satisfy us that the defendant is about to dispose of, or remove, his property, in order to obstruct or delay execution of any decree which we may pass against him; and even then he would not be entitled to such relief unless the defendant should fail to furnish security. But the effect of the District Judge's order, is to give to the plaintiff an attachment before judgment without any proof having been offered that the defendant has a dishonest intention, and without any option having been offered to the defendant of furnishing security, and retaining possession of his own property.

For these reasons, we consider that the District Judge's order should be set aside, and that the defendant's application for the removal of the attachment on his property should be allowed.

Order accordingly.

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[APPELLATE CIVIL JURISDICTION.]

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July 2.*Regular Appeal No. 52 of 1872.*DA'MODARDA'S MA'NIKLA'L ...*Plaintiff and Appellant.*UTAMARA'M MA'NIKLA'L.....*Defendant and Respondent.**Minor—Accounts of Administrator—Plaint under Act XX. of 1864,
Sec. 19—Acts of misconduct—Permission of Judge in Chambers.*

A plaint under Act XX. of 1864 by a relative of a minor against his administrator, must specify one or more acts of misconduct, or assign some satisfactory reason for apprehending an injury to the estate of the minor by the administrator.

THIS was a regular appeal from the decision of W. H. Newnham, Acting Judge of Surat.

Dāmodardās brought this suit under Sec. 19 of Act XX. of 1864 for an account of the property of his two minor brothers, whose estate was administered by the defendant under a certificate granted to him under that Act. The District Judge held that the plaintiff was not entitled to the account sought by him without setting forth in the plaint that the defendant had been guilty of some malversation, or without stating that some cause for the action had arisen.

The appeal was argued before WESTROPP, C. J., and MELVILL, J.

Leith (with him *Shāntārām Nārāyan*) for the appellant.

Anstey (with him *Dhirajlāl Mathurādās*) for the respondent.

WESTROPP, C.J.:—This suit is brought for an account under Sec. 19 of Act XX. of 1864 by the plaintiff, as brother of two minors, against his and their elder half-brother, who has obtained a certificate of administration under Sec. 6 of the same Act, and been appointed guardian of the minors. The plaintiff in his plaint merely says that the conduct of the defendant is improper, and that the plaintiff has suspicions that the defendant will waste the property of the minors, but fails to specify any instance of malversation of the defendant in either of his offices of administrator and guardian, or to give any reason

plausible or otherwise, for believing that the defendant will waste the assets. We are clearly of opinion that such a plaint is unsustainable and sets forth no cause of action. It never could have been intended by the Legislature that any relative of a minor might, without assigning a fair reason for such a course, harass an administrator under the Act by bringing a suit for an account of the money or other property of the minor in the care or management of the administrator. Were it so, any relative of the minor, disappointed in obtaining a certificate of administration, as is frequently the case, or for other reasons entertaining vindictive feelings against the administrator, might not only subject the latter to great and useless annoyance, but also injure the estate of the minor. For, in the event of the defeat of the plaintiff, in such a suit the costs awardable against him, being costs between party and party under Reg. II. of 1827 and Act I. of 1846, would not, in the majority of cases, even approximately reimburse the defendant, the administrator, for the actual expenses which he would necessarily incur in his defence, and he would of course be entitled, under such circumstances, to recoup himself, to the extent of the deficiency, out of the estate of the minor. The plaint here in substance amounts to no more than a statement that the plaintiff thinks ill of the defendant as administrator. Were we to hold that to be a sufficient reason for the institution of a suit, we should encourage much idle litigation. Every plaint, under Sec. 19 of Act XX. of 1864, should specify either some one or more acts of misconduct on the part of the administrator in his office, or should state some reasonable ground for supposing that he is about to waste the estate of the minor. We do not go the length of saying that the plaintiff should not be at liberty to prove acts of misconduct in addition to those specified, but we do hold that the plaint should specify one or more such acts or should assign some satisfactory reason for apprehending an injury to the estate of the minor by the administrator. This is the second suit brought by the plaintiff against the administrator (see 9 Bom. H. C. Rep. 39), and he ought to have been more cautious in the manner in which he framed his plaint.

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1873. We, therefore, decline to grant to him leave to amend it, as
 DA'MODAR- asked for by his learned counsel, and must, on the grounds
 DA'S assigned by the District Judge, affirm his decree with costs.
 MA'NIKLA'L We may mention that in the Supreme Court, and at the
 v. Original Jurisdiction Side of the High Court, the practice
 UTAMARA'M has been not to allow a person, as next friend of an infant,
 MA'NIKLA'L to bring a suit on behalf of the latter without the previous
 permission of a Judge in Chamber.

Decree confirmed.

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[APPELLATE CIVIL JURISDICTION.]

1873.
 July 7.

Special Appeal No. 62 of 1873.

ABDUL GANI..... *Plaintiff and Appellant.*
 KRISHNA'JI BHIKAJI for
 himself and as the heir
 of the deceased BA'LU
 KRISHNA'JI..... *Defendant and Respondent.*

*Mortgage—Land Revenue—Occupant—Mortgagee's omission to pay
 Land Revenue—Purchaser at a Revenue Sale—Bombay Act I. of 1865,
 Sec. 36—Title—Mesne Profits.*

Where land, in the possession of a mortgagee, is sold by the *Mamlat-
 dar* for arrears of Government land revenue :—

Held that as the land revenue is the paramount charge on the land,
 whoever derives title from the occupant takes it subject to that charge
 and that, therefore, the purchaser at the sale was entitled to the land,
 free from any mortgage lien.

THIS was a special appeal from the decision of G. Ayerst,
 Acting Assistant Judge of Tanna, affirming the decree
 of the Subordinate Judge of Mahad.

Abdul Gani brought the action to establish his right to,
 and obtain, possession of certain land with a claim for the
 mesne profits thereof for two years. The land was sold by
 the revenue authorities on the 10th February 1868 for

arrears of revenue due to Government, and was purchased by the plaintiff, Abdul Gani. The defendants were in possession of the land under a mortgage, dated the 14th January 1866. The Subordinate Judge awarded possession of the land to the plaintiff on his paying the mortgage money to the defendants.

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In appeal the plaintiff contended that being a purchaser at a revenue sale, he was entitled to hold the land absolutely under Sec. 36, Bombay Act I. of 1865. The Assistant Judge held that the plaintiff acquired by the revenue sale only the right and interest of the mortgagor in the land, and was in no better position, and that, therefore, his purchase was subject to the satisfaction of the mortgage lien.

The special appeal was argued before WESTROPP, C.J., and NA'NA'BA'I HARIDA'S, J.

Dhirajlal Mathuradas for the appellant :—The decision of the Lower Court is opposed to the provisions of Sec. 36, Bombay Act I. of 1865, and Sec. 12 of Regulation XVII. of 1827. The land having been sold by the revenue authorities, on failure by the occupant or his mortgagee of payment of Government assessment, and purchased by the plaintiff, the Assistant Judge was wrong in holding that the plaintiff purchased it subject to the claim of the mortgagee.

Ghanasham Nilkant, *contra* :—Exhibit 32 shows that only the mortgagor's right and interest were sold. No demand on the part of the revenue authorities was made on the mortgagee, and, therefore, the sale could not affect him. Besides, by the mortgage deed, the mortgagor had agreed to pay the Government assessment.

WESTROPP, C.J. :—The land revenue is the paramount charge upon the land. The right of occupancy depends on payment of that revenue, Bombay Act I. of 1865, Sec. 36. Whoever, whether by mortgage or otherwise, derives title under the occupant, takes the land subject to that liability. Government in respect of land revenue is only bound to recognize the occupant, who is, by Sec. 2, cl. (j) of the same

1873. Act, defined to be "the person whose name is entered
 ABDUL GANI authorizedly in the survey papers, or other public accounts,
 v. as responsible to Government for payment of the assessment
 KRISHNA'JI due upon any field or recognized share of a field." The
 BHIKAJI. mortgagee, if he wish to maintain his security, ought to see
 to the regular payment of the land revenue, and if he do
 not, he has only his own negligence to blame if the land be
 sold by Government for non-payment of that revenue. As
 to the paramount nature of the claim of Government, see
Secretary of State for India v. Bombay Landing and Ship-
ping Company (a). The purchaser Abdul Gani, therefore,
 acquired a good title under the sale made to him by the
 Mám-latdár, and has become duly entitled to the possession
 and occupancy of the lands in dispute and to a reasonable
 sum for mesne profits since the tenth day of March 1868
 (being one month after the sale to the plaintiff by the
 Mám-latdár), until the delivery of possession of the land to
 the plaintiff under our decree.

The Court, therefore, reverses the decrees of both of the
 Courts below, and declares that the plaintiff has established
 his title to the occupancy and immediate possession of the
 lands in dispute under the sale, made to him by the Mám-
 latdár, on the 10th day of February 1868, free from any
 mortgage to, or claim by, the defendants, and orders and
 decrees that the plaintiff be forthwith put into such occu-
 pancy and possession; and this Court further directs the
 Court of the Subordinate Judge to ascertain and allow to
 the plaintiff a reasonable sum for mesne profits of the land
 from the 10th day of March 1868, until the time of delivery
 of possession of the land under this decree to the plaintiff;
 and this Court also directs the defendants to pay to the
 plaintiff the sum to be so allowed by the Subordinate Judge
 for mesne profits, and the costs of the suit, and of both ap-
 peals.*

Decrees reversed.

(a) 5 Bom. H. C. Rep., O. C. J., 23 and especially pp. 48, 50.

* See next case.

12 R. 5 B. 1-76

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 271 of 1873.

1873.
September 17.

GUNDO SHIDDHESHVAR ... *Defendant and Appellant.*
MARDAN SA'HEB *Plaintiff and Respondent.*

Government revenue a paramount charge on land—Liability on failure to pay it—Bombay Survey Act, I. of 1865, Sec. 36—Omission by the purchaser of land to get his name entered as occupant in the Collector's Books.

Government revenue being a paramount charge on the land, it adheres to the land and to every portion of it independently of the hands into which it passes, or the subordinate rights that may have been created by the occupant out of his own qualified proprietorship; so that, even after a valid sale of the land by the occupant to a purchaser, who neglects to get his name registered in his books, the Collector may, after giving notice, of the failure to pay the revenue to the registered occupant—in whom alone, according to the Bombay Survey Act I. of 1865, vests the right of conditional occupancy—put up the land for sale, and the purchaser gets occupancy rights free from all claims on the part of the first purchaser.

THIS was a special appeal from the decision of Baron Lar-pent, Acting Judge of Dhárwár, reversing the decree of the Subordinate Judge of Haveri.

Ningavá, the registered occupant of a piece of land, by an instrument duly executed and registered, transferred all her rights therein to the plaintiff Mardan Sáheb who, however, neglected to have his name entered in the Collector's books. The Collector, upon default being made by Ningavá in payment of the Government assessment, gave her notice, and sold the occupancy rights to the defendant Gundo.

The Court of first instance rejected the claim of the plaintiff for possession and occupancy rights, but the Appellate Court awarded it.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA's, JJ.

Dhirajlál Mathurádás, Government Pleader, for the special appellant:—The defendant purchased the land at a sale by auction held by the Collector for arrears of land revenue,

1873. which has been held to be a paramount charge on the land,
 GUNDO SHID- and the purchaser obtains the land free from all incumbrances :
 DHESHWAR *Abdul Gani v. Krishnaji (a)*. A crown debt is entitled to
 v. precedence over all other debts both in England as well as in
 MARDAN the Presidency town and Mofussil of Bombay : *The Secretary*
 SA'HEB. *of State v. The Bombay Landing and Shipping Company*
(b). The plaintiff was bound, under the Survey Act and
 Rules, to have his name entered in the Collector's books after
 his purchase. This he failed to do, and has thus rendered
 himself liable to forfeit his right of occupancy, which is a
 conditional right, subject to the payment of Government re-
 venue. The Collector can only recognize him whose name
 stands in his books.

Shámráv Vithal for the special respondent :—This case does not involve the right of the Crown. The only question to consider here is whether the plaintiff acquired by his purchase all the rights which Ningavá, at the date of the purchase, possessed in the land. This he seems to have done. His purchase was valid in every respect. He, therefore, ought to have been looked to by the Collector for payment of the revenue in case of default, especially as the Collector had notice of the plaintiff's purchase, notwithstanding that his name was not on his books.

Bombay Act I. of 1865, Sec. 48, provides for the recovery of land revenue according to the Regulations. Sec. 5 of Regulation XVII. of 1827 makes the occupant liable in person and property for his revenue ; the third clause of this section makes the crops also liable for its revenue in preference to all other claims. Further on the Regulation by Sec. 11 provides precautionary measures, and deals with the attachment of crops ; and Sec. 12 enacts the procedure for realization of the revenue in case of default. This, along with Sec. 3 of Regulation XIX. of 1827, is the whole law on the subject of forcible levy of Government demands. There is nothing here which prevents the alienation of the occu-

(a) Ante p.

(b) 5 Bom. H. C. Rep. O. C. J. 23.

pancy rights ; and when the alienation to the plaintiff in this case took place no revenue was due to Government.

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The definition of "occupant" is given in Sec. 2, Cl. (j), of the Bombay Survey Act. It points to a liability rather, than to a right. The rights of "occupants" are given in Sec. 36 ; and one of these is the right to transfer. This right, although conditional on payment of assessment, is not conditional on the Collector's sanction. If the transferee made default in this payment, the Collector could undoubtedly exercise his right of deprivation ; but he has not done so. The precedent cited does not apply. In *Abdul Gani v. Krishnaji* (*supra*) the plaintiff was only a mortgagee ; whereas in this case he is a purchaser. In the former case full rights had not accrued to the plaintiff, who was subject to redemption ; but in this, default was not made till years after the accrual of those rights.

The judgment of the Court was delivered by WEST, J.:—The facts of this case, though they have been made the foundation of an elaborate argument, are of a simple character. Mardan Sáheb, the plaintiff, in 1865 bought from Ningavá her property in a Survey number at Ranebednar. His contract was registered, but no application was made to the Collector for a mutation of names in the books kept by him. A dispute had in fact arisen between the vendor and vendee, and the latter being forced to take legal proceedings did not obtain a final decree against Ningavá until 6th February 1871. Why Mardan Sáheb did not then immediately get his own name entered in the revenue accounts as occupant, does not appear. Possibly, he wished to avoid the obligations attaching to the occupancy, for Ningavá had in the meantime made a default in paying the Government rent, and after publication of a notice addressed to her, her occupancy rights were sold on the 14th April 1871. The defendant Gundo was the purchaser.

It has been contended for Mardan Sáheb that the 48th section of the Bombay Survey Act I. of 1865, prescribes that

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land revenue not duly paid shall be recovered according to the Regulations. Regulation XVII. of 1827 provides for the attachment of crops, even before they are reaped, when there is any doubt of the intention or the ability of the occupant to pay what is due. It provides for the use of *mohu-sulli* to bring defaulters to reason. But when these measures fail, or it is not deemed expedient to resort to them, the liability, it is urged, rests not as a specific lien on the land, but only as an obligation on the person and property of the occupant. Under Sec. 12, cl. 6 of the Regulation, the Collector could attach and sell the property of Ningavá, and, as included within that property, her rights, had any remained to her, in the land held by her as occupant. But those rights had some years before passed to Mardan Sáheb. Sec. 36 of the Survey Act vests the occupant with an unrestricted power of transfer which had already been exercised in this case in 1865. From that time forth, therefore, Mardan Sáheb was the true occupant entitled to hold that position until he made default, and the land as part of his property was sold to make good the amount of the arrears. By a sale of Ningavá's right, nothing, it is said, consequently passed to Gundu, and the plaintiff is entitled to eject him

A similar course of reasoning must have led the District Judge to the conclusion that the plaintiff was entitled to recover. "When the Collector sold this land," he says, "it was no longer the property of Ningavá. The defendant should have inquired as to the title which was being sold by auction, and he cannot complain" of the decree which the District Judge then proceeded to make for his ejectment. But the decision in *Abdul Gani v. Krishnaji* (c), given on the 7th July last, which has been followed in a more recent case, declares the Government revenue to be a paramount charge on the land; and being of this character it adheres to the land and to every portion of it independently, of the hands into which it passes or the subordinate rights that may have been created by the occupant out of his own

(c) See preceding case.

qualified proprietorship : *Penn v. Lord Baltimore* (d). But further, Sec. 36 of the Survey Act calls the right of an occupant a "right of conditional occupancy," and the first part of the same section shows that amongst the conditions, on which the right of occupancy depends, is the regular payment of the assessment. The right is of course not a mere right to payment or, in other words, a bare liability. Such a right as this Gundo would not object to recognize in the plaintiff, but the plaintiff would never have given money for it to Ningavá. The right is a right to occupy subject to the assessment, and defeasible on a default in payment, at the same time that, according to the explanation of "occupant" given in Sec. 2 of the Survey Act, no person can be recognized as holding that position except the one whose name is entered in the Government accounts. No. 13 of the Survey Rules provides for a mutation of names on a change of ownership, so as to give effect to the provisions of Sec. 36 of the Act, and such rules it was competent to the Government to make under Sec. 28. If Mardan Sáheb desired to make his right secure against defeasance, he ought to have obtained a mutation of names in the Government books. By not doing so, he left himself exposed to the risk of a forfeiture of the right of occupancy, recognized by the Act, as vested in Ningavá alone and attached as a condition to the holding. On her default, the Government by the sale to Gundo has exercised its power of deprivation, the "conditional occupancy" has come to an end, and the plaintiff has no remedy against the purchaser.

We must, therefore, reverse the decree of the District Judge and restore that of the Subordinate Judge. Costs throughout on respondent.

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[APPELLATE CRIMINAL JURISDICTION.]

1873.
October 29.

Criminal Reference No. 140 of 1873.

REG. v. RANCHHOD DAYA'L.

Second Class Magistrate—Jurisdiction—Criminal Procedure Code, Section 473—Indian Penal Code, Sec. 188.

A Second Class Magistrate, who issues an order under Sec. 518 of the Criminal Procedure Code, has no jurisdiction to punish for its disobedience by reason of Sec. 473 of the Criminal Procedure Code.

THIS case was referred for the orders of the High Court by the District Magistrate of Broach with the following remarks :—

“The Second Class Magistrate of Ankleshvar, Azam Amritram Chintamanshankar, served Ranchhod Dayál with a notice, and issued an order under Sec. 518 of the Criminal Procedure Code for him to remove a local nuisance within seven days. The order having been disobeyed, the same Magistrate proceeded to try Ranchhod Dayál and sentenced him, under Sec. 188 of the Indian Penal Code, to pay a fine of one rupee, or, in default, to suffer two days' simple imprisonment. The fine was paid.

“As it appears to me that, under Sec. 473 of the Criminal Procedure Code, the Magistrate had no authority to try the case, I submit the proceedings for the orders of the High Court.”

The reference was considered by MELVILL and NA'NA'BHA'I HARIDA'S, JJ., on the 29th October 1873.

PER CURIAM :—Conviction and sentence annulled for the reasons stated by the District Magistrate. The attention of the Second Class Magistrate should also be called to the provisions of Sec. 188 of the Indian Penal Code, which require that it should be proved, not only that an order has been disobeyed, but that the disobedience causes, or tends to cause, obstruction, annoyance, or injury, or risk of the same, to any person lawfully employed.

[ORIGINAL CIVIL JURISDICTION.]

In Chambers.

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KESHAVJI NA'IK AND ANOTHER

July 3.

v.

NASARVA'NJI ARDESIR WADIA.

*Written Statements—Civil Procedure Code, Sec. 124.**Relevancy—Tendering—Jurisdiction.*

The Court has jurisdiction to take a written statement off the file, for irrelevancy, until it is "tendered," which is when it is produced at the hearing of the suit.

"Relevancy" is to be judged by what the defendant believed to be material to his case, and not whether it did in fact disclose a good defence to the action.

THIS was an application under Sec. 124* of Act VIII. of 1859. The plaint was in trover for the recovery of some documents, which the written statement admitted were in the possession of the defendant, and which the defendant was willing to give up if the Court thought it was proper that he should do so; the rest of the matter contained in the written statement, stated generally, was to the effect that the defendant wanted to use the documents to cross-examine the present plaintiff in another suit in which he was assignee, and had an interest pending in this Court against him, and in which they had been put in.

A summons was taken out before SARGENT J. by the plaintiffs, calling upon the defendant to show cause, why the written

"*Sec. 124. If it shall appear to the Court that any written statement presented by or on behalf of a party, whether the same have been spontaneously tendered or have been called for by the Court, is argumentative or unnecessarily prolix, or that it contains matter irrelevant to the suit, the Court may reject the same, and return it to the party with the order of rejection endorsed thereon; and it shall not be competent to a party, whose written statement has been rejected for any of these causes, to present another written statement, unless it shall be expressly called for or allowed by the Court."

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statement, which had been filed in answer to the plaint, should not be rejected and taken off the file, and returned to the defendant, on the ground that it contained matter irrelevant to the suit, or why at least the first and second paragraphs thereof should not be expunged.

The summons was dated the 27th of June 1873, and on the day previous a notice had been addressed by the plaintiff's attorneys to the defendant's attorneys, which notice set forth that the written statement, in question, contained a great deal of matter which was not only irrelevant, but was scandalous and most improper, and called upon the defendant's attorneys, either to consent to a Judge's order for it to be taken off the file, or that, at least, the matter complained of should be expunged therefrom. The defendant's attorneys replied on the same day, declining to consent to the above request.

Anstey, in showing cause against the summons, contended that the Court had no jurisdiction in the matter, and that, if it had, this was not a case in which it would exercise it. As to the first point, he contended that the Court loses the opportunity contemplated by the Code of rejecting written statements if it did not see the document when it was tendered, and according to the practice of this Court, the written statements are not shown to the Judge before they are filed with the Prothonotary. And, on the second point, he submitted that the written statement of his client did not contain matter which was irrelevant to the suit, and that the Court had no power under the Code to consider whether or not any matter in the written statement was scandalous, and could not expunge any such matter; he cited *Smallwood v. Parry (a)*, and *Abbott v. Abbott (b)*.

Honourable A. R. Scoble, Advocate General, in supporting the summons, contended that the Court had undoubtedly power to reject a written statement which contained irrelevant matter, and that under the powers inherent in it as a

(a) 1 Coryton 39. (b) 4 Beng. L. Rep. O. C. J. 51.

Court of Record, the Court had undoubtedly the power to order any document or proceeding to be taken off the file, and removed from the record of the Court, which contained scandalous or improper matter: he cited *Ex parte Simpson* (c). He also argued that this being really a Common Law Action in trover the defendant's written statement set forth no grounds of defence to the suit, because it admitted the possession of the documents, which was the only thing sought to be recovered in the suit; and practically that they were the property of the plaintiffs, and that he was willing to deliver them up, if the Court thought it was proper that he should do so. As to the rest of the matter contained in the written statement, such matter was entirely irrelevant to the questions at issue in this suit, there was no doubt upon reading the written statement that it contained matter which was most scandalous; for it alleged matters against the plaintiffs which, if true, would subject them to criminal charges.

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SARGENT, J.:—This is mainly a question of jurisdiction. The difficulty arises as to the practice of the Court, as to the reception of written statements not being, *simpliciter*, the practice contemplated by the Code. In construing the Code, endeavour must be made to put such a construction on the practice as not to render null and void the provisions of the Code. The filing of a written statement does not necessarily make it a part of the record, but it is merely for the purpose of notice to the plaintiff of the nature of the defence. The production of the written statement at the trial is the "tendering" contemplated by the Code, and if not then objected to, the written statement becomes part of the record. I will not decide that this objection was taken too early; and it might be that if it was taken at the hearing it might be argued, on the authority of *Smallwood v. Parry*, cited by Mr. Anstey, that it was taken too late. There is no practice on the subject. What was done then was in analogy to Chancery practice. I am, therefore, of opinion that the Court has jurisdiction. Then, as to the

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relevancy of the written statement, the question is not whether it discloses a good defence to the action, but whether the facts stated therein are such as the defendant believed to be material to his case. The defendant admits that the documents are the property of the plaintiffs, and urged that they were intended to be used, and had been put in, in a suit in which he was assignee and had an interest. He might have got himself made a party to that suit, but he did not do so. If his narrative had been confined to this circumstance, it would have been relevant; I will not say, a good defence, but relevant and material to the case. It appears to me that, though great latitude must be allowed in construing the word "relevant" it would be going too far to say that some of the statements or allegations contained in the written statement under review had any bearing on the suit. The plaintiffs have objected to the first and second paragraphs of the written statement, but I think the first paragraph might be considered relevant. I shall reject therefore the written statement, and order it to be returned to the defendant; and upon the question of costs, as the plaintiffs had given notice of their objection to the written statement, and the defendant had refused to comply with the terms of their request, the defendant must pay the costs of, and incidental to, the application with counsel's fees certified.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 257 of 1873.*1873
August 14.GANU BIN HANMANTRA'V *et al*, OriginalDefendants Nos. 2 and 3 *Appellants.*MORO GANESH *Plaintiff and Respondent.**Ejectment—Third parties—Sec. 73 of the Civil Procedure Code.*

A landlord sues to eject his tenant. Other persons setting up a title adverse to the landlord are, at their own request, made parties under Sec. 73 of the Code of Civil Procedure.

Held that these persons cannot, by introducing themselves as parties change the nature of litigation between the landlord and his alleged tenant; but to establish their superior title, otherwise than through the tenant, they must bring a separate suit.

THIS was a special appeal against the decision of S. Hammick, Acting Assistant Judge of Puna, confirming the decree of the Subordinate Judge of Puna.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Mánikshá Jehángirshá for the special appellants.

V. N. Mandlik appeared for the respondent.

The facts, in so far as they are material, appear from the following judgment :—

PER CURIAM :—The plaintiff, in the present case, sued to eject the defendant Sadoji from *Pátilki watan* land, alleging that he had allowed him to occupy it, he himself being *Pátíl*, as remuneration for his services while employed by the plaintiff as his substitute, which employment had now ceased. The plaintiff succeeded in his action, and Sadoji did not appeal against the decree of the Court of first instance. The present appellants, who had been allowed to come in at their own request as additional defendants, did appeal, and without raising any objection to the Subordinate Judge's finding that the defendant, Sadoji, had obtained the land from the plaintiff and held under him, they went to trial in appeal on the principal issue of whether the plaintiff was or was not the occupant of the office of *Pátíl*, in which character he averred that he

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had put in the defendant Sadoji. The Assistant Judge has found that he is the occupant of the office, and as such occupant is entitled to possession of the *watan* as against the appellants. The latter might maintain the right of Sadoji as their tenant, but in order to do this they had to take his place: *Doe d. Knight v. Smythe (a)*. They could not, by introducing themselves as defendants, cause an essential change in the nature of the litigation as already constituted between the plaintiff and Sadoji, or give themselves the advantages of defending instead of attacking parties: see the remarks of Coleridge, J., in *Doe d. Willis v. Birchmore (b)*. The plaintiff is the *Patil* in possession. He placed Sadoji in possession, and, on making out a case for the ejectment of Sadoji, is entitled to obtain, and to retain, possession as against the present appellants until they establish a title superior to his. This it may be open to them to do in another suit, but for the present the decree of the Assistant Judge must be confirmed with costs.

Decree confirmed.

[APPELLATE CIVIL JURISDICTION.]

August 14.

Special Appeal No. 245 of 1873.

MA'HA'BUBIBI, WIDOW OF FATE'

MUHAMMAD *Plaintiff and Appellant.*

AMINA', WIDOW OF FATE'

MUHAMMAD *Defendant and Respondent.*

Muhammadan Law—Dower—Limitation—Act XIV. of 1859, § I. cls. 12 and 16.

The limitation of six years prescribed in clause 16, Sec. I. of Act XIV. of 1859, and not clause 12 of that section, applies to a suit by a Muhammadan widow to recover the amount of her dower, as her right does not constitute an interest in immoveable property.

THIS was a special appeal from the decision of E. Cordeaux, Assistant Judge, F. P., of Puna, at Sholapur, reversing the decree of the Subordinate Judge at Sholapur.

(a) 4 M. S. 347.

(b) 9 A. & E. 669.

The plaintiff Máhábubibi, the second wife of Fatè Muhammad, sued Aminá, an elder wife of Fatè Muhammad, who was in possession of the property left by him, to recover the amount of her *Mehr* or dower. Fatè Muhammad died more than six and less than twelve years before the institution of the suit. The exact date of his death did not appear.

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The Subordinate Judge awarded the claim, but the Court of Appeal rejected it, as being barred by Act XIV. of 1859 Sec. I., cl. 16.

The special appeal was heard by WEST and NA'NA'BHA'I. HARIDA'S, JJ.

Mánikshá Jehángirshá appeared for the appellant.

Janárdan Sakhárám Gádgil for the respondent.

PER CURIAM :—Mr. Manikshá has not been able to refer us to any authority for the proposition that a right to dower is of such a nature as to give a special lien upon the property of a deceased Muhammadan husband. In the case of *Mussamut Janee Khanum v. Mussamut Amatool* (a), it is said that dower stands exactly on the same footing as any other debt of the deceased. In *Mahomed Noor Buksh v. Budun Chund Bebee* (b), it was held that a widow might enforce payment of her dower by a purchaser from the heir of her husband, but no distinction is taken in that case between a claim for dower and any other debt due from the estate. Nor does any distinction seem to be recognized in the opinion of the Muhammadan law officers given in the case of *Mt. Beebee Sahib v. Dada Bhaee* (c). There are passages which impose on the Courts the duty of seeing debts paid before the residue of a Muhammadan estate is distributed: see the first and the last of the above cases; but it is not clear that these passages constitute all debts a charge on the estate, or an interest in the property, in the English sense, which we must suppose to have been the one intended by clause 12 of Sec. I. of Act XIV. of 1859; and in the recent case of Special Appeal No. 88 of 1873,*

(a) 8 Calc. W. R. Civ. R. 51. (b) Calc. S. D. A. Rep. for 1852, 885.
(c) 2 Borr. Rep. 570.

* Note.—In that case Westropp, C.J., said that “although the property of a deceased Muhammadan is, when in the hands of his heir, liable to the payment of the debts of the deceased, yet neither in the case of a

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 AMINA'. it was expressly ruled that the property of a Muhammadan is not so hypothecated for his debts as to prevent an alienation of it for value by the successor to the deceased debtor. If dower, therefore, stands on the same footing as an ordinary debt, it cannot be regarded as an interest in the immoveable property of the deceased husband. It is rather an obligation on the person of the successor to the estate in virtue of his succession, and one capable of enforcement by lien if the property should be in the possession of the widow. This lien, having once attached, binds the property after the widow, in compliance with the order of a Court, has had to give up possession of it to the heirs; but this rests probably on the principle that the Court will not deprive her without an equivalent of an advantage to which she is entitled rather than that of her having an interest in the property independently of its having ever been in her possession. In the recent case of *Mussamut Bibi Bachun v. Sheik Hamed Hosein (d)*, the Privy Council declined to say that the right of a widow, even in possession, was, in the strictest sense, a lien while recognizing her title to hold for her dower as a creditor with a liability to account. In the absence of authorities for the proposition that the widow's claim for dower constitutes an interest in the immoveable property left by her husband, we must hold that the Assistant Judge was right in applying clause 16, and not clause 12, of Section I. of Act XIV. of 1859 to the claim in this case, and confirm his decree with costs.

Muhammadan (*Mussamut Moona v. Chand Monee Gossain*, 7 Calc: W. R. Civ. R. 206), nor of a Hindu (*Jamiyatram v. Parbhudas*, 9 Bom. H. C. Rep. 116) is the property of the deceased so hypothecated for his debts as to prevent his heir from disposing of it, before attachment under a decree, to a third party for valuable consideration. A creditor, not holding a special lien, such as a mortgage, &c., on the property, cannot follow it into the hands of a person who has purchased it from the heir of the deceased in good faith and for valuable consideration. The heir, however, is, of course, responsible for the due administration of the purchase money."—ED.

(d) 14 Moo. Ind. App. 877.

L.R. 6 Bom. 128.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 286 of 1873.

1873.
September 4.

KISAN NANDRA'M *Plaintiff and Appellant.*

ANANDRA'M BACHA'JI *Defendant and Respondent.*

Act XXIII. of 1861, Sec. II.—Cause of action—Execution of decree.

Plaintiff's father purchased a house on the 11th June 1854 at a sale made under a decree against G. D., but was not put into possession of it; accordingly in 1866 he obtained a decree for possession which, however, was never executed. The defendant in 1870 obtained possession of the house by another sale made in execution of another decree against G. D. The present suit was instituted by plaintiff in 1871.

Held that not only was the remedy on the cause of action, which accrued in 1854, and the decree of 1866 barred, but also that Act XXIII. of 1861 Sec. 11 prevented the plaintiff from bringing a new suit on the fresh cause of action accruing to him under the decree of 1866, as that section "took away from the parties to the suit the right to raise by a fresh suit any question as to their rights and liabilities under the decree." (*Rangnasary v. Shappani*, 5 Mad. C. H. Rep. 375.)

THIS was a special appeal from the decision of E. T. Candy, Extra Assistant Judge of the District of Thana, affirming the decree of Váman Ganesh Bakhle, Subordinate Judge of Pimpalgaon.

The special appeal was argued before WESTROPP, C.J., and PINHEY, J.

Shántárám Náráyan for the special appellant :—The decree of 1866 gives a new cause of action to the plaintiff, and though its execution has been barred against the defendant, the plaintiff has a right under it to maintain the present suit.

No one appeared for the special respondent.

WESTROPP, C.J. :—The plaintiff's father, Nandráam Motirám, at a judicial sale by auction made under a decree against

1873. **Gabháji Dhondi**, purchased the house, the subject of this suit on the 11th June 1854. Not having been put into possession of that house, he brought a suit to obtain it in the year 1866 against **Gabháji Dhondi**, and in that year, a decree for possession was made in favour of **Nandrám**, the present plaintiff's father. According to the facts, as found in the present case by the Assistant Judge, that decree has never been executed, and neither the plaintiff nor his father, **Nandrám**, has ever been in possession of the house, which continued in the possession of **Gabháji** so long as he lived, and, after his decease, in the possession of his widow, until the present defendant, **Anandrám**, was put into possession thereof on the 25th June 1870, he having purchased the same at a judicial sale by auction, made on the 17th February 1870, under a decree in a suit brought by one **Tabáji** against **Gabháji**. The present suit was instituted, on the 19th October 1871, by **Kisan**, son of **Nandrám**, the original purchaser of 1854. The remedy on the cause of action, which accrued on the purchase in 1854, being barred by the lapse of more than 12 years, and the right to issue process on the decree of 1866 having been barred, under Sec. 20 of Act XIV. of 1859, by the lapse of more than three years, it has been argued for the plaintiff (special appellant) that nevertheless a fresh cause of action accrued to the plaintiff under that decree, and that upon it this fresh suit may be sustained. We, however, are of opinion that Sec. 11 of Act XXIII. of 1861 prevents the plaintiff from bringing any such new suit, and we concur in the view taken by the High Court of Madras of that section in *Sanjeeviyah v. Nanjiyah* (a) and *Ranganasary v. Shappani* (b). If the plaintiff in this suit have lost a right to which he was once entitled, he can only blame his own supineness—*vigilantibus non dormientibus subveniunt jura*. On this ground we affirm the decree of the Extra Assistant Judge with costs, if any.

Decree affirmed.

(a) 4 Mad. H. C. Rep. 453.

(b) 5 Idem 375.

2d R. S. B. 110.
114 B. 110.

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[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 255 of 1873.

1873.
September 8.

PADU MALHA'RI and another. *Defendants and Appellants.*

RAKHA'JI, heir of KRISHNA'JI

deceased, by her manager

VA'SUDEV PA'NDURANG ... *Plaintiff & Respondent.*

Code of Civil Procedure, Sec. 259—Registration—Certificate of Sale—Act XX. of 1866, Secs. 17, 42, and 49—Value of unregistered certificate of Sale.

A certificate of sale, issued under Sec. 259 of the Code of Civil Procedure, is an 'instrument' requiring registration within the meaning of Act XX. of 1866, Sec. 17.

Where such a certificate is not registered, other evidence is not admissible to prove the sale.

Per NA'NA'BHA'I HABIDA's, J.—An unregistered certificate of sale is not only inadmissible in evidence but invalid.

THIS was a special appeal from the decision of W. M. P. Coghlan, Judge of the District of Thana, reversing the decree of Kharsedji Rustamji, Subordinate Judge of Kallián.

The facts of the case are briefly these :—

Rámchandra, in 1860, mortgaged, without possession, a piece of land, belonging to him, to Pándurang, who obtained a decree against him and in execution thereof sold the land through the Civil Court on the 20th January 1870. The plaintiff's husband became the purchaser and gave a receipt in acknowledgment of having received possession of the property, but omitted to get his certificate of sale registered. The original proprietor, Rámchandra, had another creditor Masáji, who had previously obtained a decree against him in 1862, and in execution of it got the same property sold in September 1866. The defendants became purchasers at this sale, and got their certificate registered. They are now in possession. How they came into possession did not appear. Under these circumstances the plaintiff and the defendants were at issue on the question of ownership and possession of the land.

Note.—The whole of this Act is repealed by Act VIII. of 1871.

1873. The Subordinate Judge was of opinion that but for the
 PADU MAL- circumstance that the plaintiff's certificate of sale was not re-
 HARI gistered he was entitled to succeed; but, on the authority of
 v. *Mulji v. Anuprám (a)*, held the certificate to be invalid, and
 RAKHMA'I. so rejected the claim. The District Judge, on appeal, reversed
 this decree on the ground that the plaintiff's husband was in
 legal possession of the land, as shown by the receipt passed
 by him to the Civil Court, and that this rendered the registra-
 tion of his certificate unnecessary.

The special appeal was heard by WEST and NA'NA'BHA'I
 HARIDA'S, JJ.

Ganpatráv Bháskar for the special appellants :—The plain-
 tiff's title rests entirely on the certificate of sale, as the de-
 fendants are admittedly in actual possession. This certificate,
 though it requires registration under Section 17 of Act XX.
 of 1866, has not been registered, and is, therefore, inadmis-
 sible in evidence and invalid : *Mulji v. Anuprám (supra)* ;
 Sec. 49 of Act XX. of 1866. The plaintiff's receipt does not
 show actual possession.

Dhirajlál Mathurádás, Government Pleader, for the res-
 pondent :—In the case, cited by the other side, the question,
 whether a certificate of sale requires registration or not, does
 not appear to have been distinctly raised. The Court seems
 to have assumed that registration was necessary. In *Fakír*
chand v. Kahándás (b), the Court held that a certificate of
 sale was a *judicial process* which might be registered at the
 option of the holder, but the force and effect of which was in
 no wise to depend on its being registered.

[WEST, J. :—There the certificate was under Regulation IX.
 of 1827.]

Sec. 42 of the Registration Act requires the Court itself to
 send a memorandum of its order to the registration officer.
 Its omission to do so in the case should not be allowed to pre-
 judice the plaintiff. The order of the Court is what transfers

(a) 7 Bom. H. C. Rep. A. C. J. 136.

(b) 3 Bom. H. C. Rep. A.C.J. 167.

property and the certificate evidences transfer but is not the only evidence of it. The sale was completed by delivery of possession: *Bálárám v. Appá* (c).

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The sale with possession gave to the plaintiff a complete title: *Tinamkhán v. Khojábhái*, R. A. No. 64 of 1871 (d).

He also referred to the following authorities:—*Mathurádás v. Káliá* (e); *Kishorbháí v. Jorábhái* (f); *Gopál v. Krishnáppá* (g); *Chintáman v. Shivrám* (h).

Ganpatráv in reply:—The certificate of sale under Sec. 259 of the Code is the only evidence of title, none other being admissible. Under Sec. 17 of Act XX. of 1866 it requires registration, as it undoubtedly operates to create or assign an interest in immoveable property of greater value than Rs. 100: *Sheikh Rahmatullá v. Sheikh Sariutullá* (i); *Somu Gurukkal v. Rangammál* (j); *Mahádu v. Báláji*, S.A. 1 of 1870 (k). In this case no evidence has been produced to prove the sale on the plaintiff's behalf, except the certificate of sale; but even if it were, none would be admissible: *Sheik Ibráhim v. Parvátá* (l).

WEST, J.:—The first point that arises in this case is whether a certificate of sale, issued under Sec. 259 of the Code of Civil Procedure, is an instrument that requires registration. Sec. 256 provides for a sale's becoming absolute when confirmed

(c) 9 Bom. H.C. Rep. 121.

(d) Decided by SARGENT and MELVILL, JJ., on the 14th June 1872.

(e) 7 Bom. H. C. Rep. A. C. J. 24. (f) Idem 56.

(g) Idem 60. (h) 9 Idem 306.

(i) 1 Beng. L. Rep. F.B. 58. (j) 7 Mad. H.C. Rep. 13.

(k) Decided by WARDEN and MELVILL, JJ., on the 10th of

March 1870.

(l) 8 Bom. H. C. Rep. A. C. J. 163.

1873. by the Court, and Sec. 259 prescribes that the certificate shall be issued after the sale has thus become absolute. Sale, however, according to the definition given in Sec. 77 of the Indian Contract Act, "involves the transfer of the ownership of the thing sold from the seller to the buyer." When, therefore, the sale has become absolute, no further property in the thing sold can remain in the former owner capable of transfer to the purchaser. Yet Sec. 259 says that "the certificate shall be taken and deemed to be a valid transfer of such right, title, and interest" as has passed from the judgment-debtor to the vendee. It has been contended for the respondent that the document is, and can be, no 'transfer' in the strict sense, there being nothing left at the moment of its issue that it can operate upon; that it is no more than a particular piece of evidence conclusive in its effect as such, but not in itself a conveyance, or operating as such, and, therefore, requiring registration under Sec. 17 of the Registration Act XX. of 1866. In confirmation of this view, Sec. 42 of the same Act has been referred to, which requires that whenever a Court 'shall by a decree or order...transfer.....any rightin immoveable property,' it shall itself cause a memorandum thereof to be sent for registration. The order under Sec. 256 must thus be registered, it is urged, and it cannot have been contemplated that the same transaction should be registered again in the form of the certificate under Sec. 259.

It would seem *a priori* unlikely that such a double registration should be required; but, undoubtedly, Sec. 259 does declare that the certificate shall be deemed to be a valid transfer of the property to which it relates. If it is a valid transfer, then the transaction must be necessarily incomplete, notwithstanding the language of Sec. 256, until it is issued. A similar suspensive effect arising from the necessity for a written instrument, as the prescribed evidence of a transfer or exchange, is provided for in the Roman Law (Cod. Lib. IV., T. XXI. L. 17) "*ut nulli liceat prius quam hæc ita præcesserint.....aliquod jus sibi ex eodem contractu vel transactione vindicare.*" The certificate being

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thus essential to the completeness of the transaction, it is the transfer, as there cannot be two, at the same time, of the same property, between the same parties; and yet it cannot affect the property without registration (Act XX. of 1866, Sec. 49). This is the view which, in the apparent contradiction between the words of the two sections, has been taken by this Court in Special Appeal I of 1870 and in *Mulji v. Anuprám* (*supra*). The ruling at 6 Madras Reports, Appendix 39, is to the same effect, and no decision, resting on the contrary view, has been cited to us. In such a case, where a perfectly satisfactory conclusion is not to be arrived at, we think it right to adhere to the received construction.

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The next point taken was, whether, as the registration is compulsory, other evidence of the sale could be received. *Mulji v. Anuprám* (*supra*), and the previous case already cited, seem conclusive that it could not. But it is not in fact alleged before us in the present case that any other evidence than the certificate was tendered. If that could not be received, the sale to the plaintiff was wholly unproved.

The sale, however, being unproved, no special importance can be attached to the document showing a receipt for delivery of the land passed by the plaintiff to the Court. How this delivery was effected does not appear. Perhaps it was one of those deliveries under Sec. 264 of the Code of Civil Procedure, which bind the judgment-debtor, but do not bind third parties: *Joogal Kishore v. Mussamut Edun* (*m*). But even supposing it was an actual and effective transfer of possession, the possession thus acquired by the plaintiff must have been immediately afterwards lost. At the time of the institution of the suit, the defendants were in possession, as they averred, under the sale made to them in 1866. The possession taken and lost by the plaintiff is an insignificant circumstance as against the present possessors, unless it can be referred to some right to which the possession could attach itself. Such a right would probably have been established,

1873. had the certificate of sale been admissible in evidence ; but, as
 PADU MAL- this document is not admissible, the plaintiff can derive no
 HA'RI advantage from a transient occupation (supposing he really
 v. occupied) resting, so far as the evidence can be looked at, on
 RAKHMA'I. no title at all.

I must, for these reasons, reverse the decree of the District Judge and restore that of the Subordinate Judge. Costs throughout on respondent.

NA'NA'BHA'I HARIDA'S, J. :—I entirely concur in the judgment just delivered. Upon the authorities cited by Mr. Ganpatráv, it is clear that a certificate of sale under Sec. 259 of the Code of Civil Procedure is an “instrument” within the meaning of Secs. 17 and 18 of the Registration Act, No. XX. of 1866. The plaintiff's certificate of sale in this case is one that falls under Sec. 17, and, being unregistered, is not only inadmissible in evidence, but invalid under Sec. 49 of that Act : *Hicks v. Powell* (n). Such being the case, it does not affect the property comprised in it, which is the one in dispute here ; nor can the sale of it to the plaintiff be proved by any other evidence : see the cases cited above and *Raja Ram Chowdky v. Seetula Buksh* (o).

As to the receipt given by the plaintiff to the Court, acknowledging that he had obtained possession of the said property, it cannot be regarded as any evidence of his possession against the defendants, who are now in possession, and who deny having ever lost it since their purchase at a Court sale in 1866. It does not in any way improve the plaintiff's case.

The decree of the District Judge must, therefore, be reversed, and that of the Subordinate Judge restored. The plaintiff to pay the costs of this appeal and also of the appeal to the Court below.

(n) L. R. 4 Ch. 741.

(o) 7 Calc. W. R. Civ. Rul. 113.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 401 of 1872.*1873.
October 13.RA'M KRISHNA GOPA'L *Appellant.*VITHU SHIVA'JI and another *Respondents.**Stamp—Mortgage—Lease—Counterpart of Lease—Reg. XVIII. of 1827, Sec. 10, cl. 3—Tender of payment of Stamp duty and penalty on special appeal.*

Where an agreement between a mortgagor and mortgagee contains a stipulation that the mortgagor should, at the time of redemption, make good the losses arising to the mortgagee from the default of tenants, which it had been agreed the mortgagee might put in, in case the mortgagor made default in payment of the rent agreed upon for the term of the mortgage ; such an agreement is not a lease, or the counterpart of a lease, within the meaning of Reg. XVIII. of 1827, Sec. 10, cl. 3, but is a contract of indemnity against losses to be incurred after the determination of the lease, which, not having any operation so long as the lease is in existence, is, therefore, not exempt from stamp duty under that Regulation

Where an appellant has not tendered the stamp duty and penalty on a document which the Courts below have held to be insufficiently stamped, the High Court will not allow him to do so in special appeal.

THIS was a special appeal from the decision of E. Candy, Extra Assistant Judge of Ratnagiri, amending the decree of the Subordinate Judge of Malwan.

The appeal was argued before MELVILL and PINHEY, JJ., on the 13th October 1873.

Shántarám Náráyan for the appellant.

Ghanashám Nílkant contra.

MELVILL, J. :—It is admitted that the decision of the Extra Assistant Judge is correct, as being in accordance with the principle laid down in *Vithal Mahádev v. Dáud* (a), unless the effect of the two agreements passed by Raghoji, one of

(a) 6 Bom. H. C. Rep. A. C. J. 90.

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the mortgagors to the mortgagee, is to necessitate an account of principal and interest on the one side, and of rents and profits on the other.

By the terms of the original mortgage, the mortgagee was to take the rents and profits in lieu of interest; and unless those terms were modified, no account would be necessary. But on the same date on which the mortgage was executed, one of the mortgagors, Raghoji, passed the agreement, the first of these two agreements to the mortgagee; and some years afterwards a nearly similar agreement was executed between the same parties.

Both these agreements have been rejected by the Courts below, on the ground that they are invalid from the want of a stamp. The special appellant contends that they are leases, or counterparts of leases, and as such, exempt from stamp duty, under the provisions of Regulation XVIII. of 1827, Sec. 10, cl. 3.

The terms of these agreements, so far as they are material, are the following, viz., 1st, that the mortgagor should hold the estate for the term of the mortgage at a certain rent, any arrears of which should be payable with interest at the time of redemption of the mortgage; and that on default of payment of rent, the mortgagee might re-enter, and let the land to other tenants; and 2nd, that the mortgagor should make good any losses arising from the default of such subsequent tenants, the amount with interest being also recoverable at the time of redemption.

It is the second of these two stipulations which the mortgagee now seeks to enforce. He asks that the mortgagor may be held liable for the losses incurred after his tenancy was determined, and that the amount may be made a charge upon the mortgaged property.

The first of the two stipulations constitutes *prima facie* nothing more than a lease, though it might be a question whether the introduction of the provision, making arrears of

rent a further charge on the mortgaged property, does not render it liable to stamp duty. It is not necessary to consider this point, as no claim is made in respect of any breach of this stipulation. But the second portion of the agreement cannot possibly, in our opinion, be construed as being, according to the words of the Regulation, a lease or its counterpart, or other engagement of a similar nature, relating to the rent of land passed between a landholder and his tenant. It is not an engagement for the payment of rent during the continuance of the lease, or for the performance of any other condition on which the continuance of the lease depends; but it is a contract of indemnity against losses to be incurred after the determination of the lease, and could have no operation so long as the lease was in existence. We think that the Courts below have rightly held that such an agreement was not exempt from stamp duty under the provision of the Regulation applicable to leases and their counterparts.

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We are now asked to allow the appellant to pay the stamp duty and the prescribed penalty. We do not think that we can do this in special appeal. Both the Courts below held that the instruments in question were invalid from want of a stamp. In either Court, the appellant might have supplied the defect. Instead of doing this, he has brought a special appeal, on the ground that the decisions of the Lower Courts as to the question of stamp are wrong in law; and we have held that they are right in law. What we are in effect asked to do is to admit fresh evidence in special appeal, which the party offering it might have given in the Courts below if he had not persisted in taking a wrong view of the law. This Court may, no doubt, when sitting in special appeal, order the stamp duty and penalty to be received in cases in which they have been tendered and improperly refused by the Court below; but we do not think that it can allow a party to remedy his own wilful omission to render his evidence admissible.*

Decree confirmed with costs.

*NOTE.— See *Gambhirmal v. Chejmal*, ante. p. 406—ED.

[APPELLATE CIVIL JURISDICTION.]

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October 29.*Regular Appeal No. 29 of 1873.*

MORO VISHVANA'TH and

others.....*Defendants and Appellants.*GANESH VITHAL and others, *Plaintiffs and Respondents.**Hindu law—Partition Suits—Right to demand partition—When
Partition questioned—Valuation of appeal.*

Partition can effectually be demanded by a Hindu more than four degrees removed from the acquirer or original owner of the property, sought to be divided, provided he is not more than four degrees removed from the last owner, however remote he may be from the original owner thereof.

Devala's text Avibhakta Vibhaktānām discussed.

Partition once effected is final and cannot be re-opened on the ground of the inequality of shares. It can be re-opened only in case of fraud, or mistake, or subsequent recovery of family property.

Presumption of union in a Hindu family is stronger as between brothers than as between cousins, and the presumption is weaker the farther from the common ancestor the descent has proceeded.

The proper valuation in the case of an amended plaint is that ascertained at the date of the amendment, and not at the date of the original filing of the plaint.

THIS was a regular appeal from the decision of Chintāman S. Chitnis, First Class Subordinate Judge of Ratnagiri, in Suit No. 905 of 1866.

The facts of the case, in so far as they are material for the purpose of this report, are briefly as follows :—

The plaintiffs and defendants are descendants of one Udhav, the acquirer of the property now in dispute between them. The former are beyond, and the latter within, the fourth degree from Udhav. The plaintiff's claim for partition was admitted by some of the defendants and opposed by the rest, principally on three grounds, viz., 1st, improper valuation of the claim; 2ndly, limitation; and 3rdly, an averment that the parties have been in a state of separation for fifty years.

The Subordinate Judge found for the plaintiffs on all these points, and accordingly gave them a decree, which it is unnecessary here to set out in detail.

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The appeal was heard by WEST and NA'NA'BHA'I HARI-DA'S, JJ.

Rávsáheb V. N. Mandlik for the appellants, the original defendants.

Dhirajlál Mathurádas, Government Pleader, for the respondents, the plaintiffs :—

WEST, J.:—Of the two preliminary points, raised on the hearing of this appeal, the first, raised on behalf of the respondents, was that the appeal was improperly valued for the stamp duty payable on account of Court fees. The appellants, it was urged, seeking to have the judgment entirely reversed, were bound to value the subject-matter of the appeal according to the aggregate of the property embraced in the original suit, and the more so as the respondents had, as plaintiffs, been compelled, at the instance of some of the appellants, to increase the valuation of the property beyond that at first set forth in the plaint. But the decree of the Subordinate Judge awards portions of the whole estate, regarded as family property, to each of the litigant parties. It is only so far as this order goes to deprive them of what they possess that the defendants now appeal against it; and they are not bound to pay duty, except on the computed value of the relief that they actually seek. As to the part of the decree which affects property in the possession of the plaintiffs (now respondents), the appellants do not desire that it should be interfered with. The persons, if any, to seek relief against that branch of the decree are the respondents, who, according to Sec. 16 of the Court Fees Act (VII. of 1870) would have to value their cross appeal accordingly. Taking that section along with Sec. 7, Sub-Sec. IV. (b) of the same Act, it appears that the appeal has been properly valued for stamp duty.

The second preliminary question was raised by the appellants. The original suit was rejected by the Principal Sadar

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Amin as barred by limitation. The claim, as there set up, was for part of the property held by the defendants. The Assistant Judge thought that, as thus constituted, the claim was barred, but that as what the plaintiffs really wanted was a partition of family property, they might be allowed to amend their plaint by including in the demand for adjudication the portion of that property held by themselves as well as that held by the defendants. The claim would thus be saved from the bar of limitation as the plaintiffs averred that they were in possession of what they held as co-parceners in an undivided family ; while, by bringing in the whole estate, the stamp revenue would be guarded against fraud, and a means afforded for doing complete justice between the parties.

Against the order of the Assistant Judge, allowing the plaint to be amended, an appeal was made to the High Court, but it was confirmed on the 27th April 1869.

The plaintiffs, as to the family property in their own possession, valued the village of Kochri according to the Government assessment, but in estimating this assessment, they took the prices of grain prevailing in 1867-68 when the amendment was made, not in 1865-66 when the plaint was originally filed. To the other principal item, viz., the *Kár-khánishí watan* at Vishálgad, the plaintiffs attached no value on the ground that, as now regulated, the place had become a mere life appointment, affording no income except to the office-holder, disposable at the pleasure of the Chief of Vishálgad, and not, therefore, any longer to be regarded as property in the true sense. They also assigned no money value to the *Sar Potdári haks* claimed by the family over Khilna and the village of Khanu, on the ground that nothing probably would be realized on account of them.

The appellants now contend that this is a mere pretended compliance with the order of the Assistant Judge, directing an amendment of the plaint, and that as such an amendment, carried out in perfect good faith, was a condition precedent to their further prosecution of the suit, the claim must be dismissed. As regards the village of Kochri, the point

chiefly dwelt on is, that the value of rice being lower in 1867-68 than in 1865-66, the part of the claim relating to that village has been undervalued in the same proportion. But the order allowing the amendment did not prescribe that the price of grain, for the purpose of determining the valuation of the village, should be taken otherwise than as it stood in the year in which the amendment was made. In an ordinary suit, the valuation of Kochri, according to rates for grain higher than what prevailed towards the close of the litigation, would cause an expense for stamp duty greater in proportion to the property that could be recovered than the legislature really contemplated. In the present suit, if the artificial valuation could have any effect on the adjudication of the case, it was fairer that the village should be appraised according to the prices of the time when the valuation was made, than according to the exaggerated rates caused by the inflation of credit in 1865-66. The permission to amend at all, however, was a permission to proceed *nunc pro tunc*, and this being once allowed, there seems to be nothing unreasonable, or, at any rate, fraudulent in making the valuation *nunc pro tunc* on a computation of the current market rates instead of those of a couple of years before. It does not appear that by this course the intentions of the legislature have been defeated, and the Assistant Judge cannot, in this particular, have desired more than that the requirements of the law should be satisfied.

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Of the remaining items, the *Sar Potdári haks* were abandoned by the plaintiffs. If they belong to the family, the defendants are thus free to appropriate them, and not entering into the plaintiffs' claim they need not enter into the valuation of it. The *Kárhánishi watan* appears to have undergone a change analogous to that sustained by similar holdings under the British Government. The *Mokásá haks*, formerly attached to the office as the property of a family, seem to have been absorbed in a payment now made strictly for services rendered. It does not appear that, over and above the remuneration of the office-holder, any sum of

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money by way of surplus, or any other advantage, is enjoyed by the general body of the *Watandár* family. The office, it is admitted, is held hereditarily by the plaintiffs' branch of the family—a circumstance of some importance for another part of the case—but it does not seem to admit of valuation for the purposes of a law-suit. It could not be sold or transferred, and thus the ordinary criterion of value cannot be applied to it.

The plaintiffs (respondents) admit that two dwelling houses occupied by them, have not been entered in the plaint. On the other hand, they do not seem to have set up any claim to a share in the abodes of the defendants. Possibly, they were influenced by the notion held by some Hindu lawyers that a dwelling house is not a subject of partition (See Coleb. Dig., B. V. T. 262). But there does not seem to have been any intention to defraud the stamp revenue by this slight omission. It does not seem to have been noticed in the Court below, and has not been pressed here by the appellants.

Upon the whole, we do not see any sufficient cause for reversing the decree of the Subordinate Judge, on the ground of an insufficient valuation of the property amounting to a fraud on the Court and a contempt of its order. We may proceed, therefore, to dispose of the case on its merits.

The first argument to be considered (one pressed with much learning and ability by Ráv Sáheb Vishvanáth Náráyan Mandlik for the appellants) is that, notwithstanding no partition may have taken place, yet, after three steps of descent from a common ancestor, the acquirer of the family property, all claims to a partition, by the descendants of one son upon those of another, cease. The comment of the Viramitrodaya on the passage of Devala cited at Coleb. Dig., B. V. T. 81, and W. and B., Pt. II, p. IV. is: "A distribution of shares shall take place down to the fourth (descendant) from the common ancestor." The special *Sapinda* relationship ends with the fourth descendant (inclusive) according to all the principal authorities, and as a great-great-grandson could not inherit, except as a *Gotraja* relation after the widow and

many other interposed claimants, it is said that the analogy of the law of inheritance prevents a lineal descendant, beyond the great-grandson, from claiming partition at the hands of those who are legally in possession, as descendants from the original sole owner of the family property or any part of it. The enigmatic language of the texts no doubt lends some support to this contention, but we think that it misses the true purpose of the rule. The Hindu law does not contemplate a partition as absolutely necessary at any stage of the descent from a common ancestor, yet the result of the construction pressed on us would be to force the great-grandson, in every case, to divide from his co-parceners, unless he desired his own offspring to be left destitute. Where two great-grandsons lived together as a united family, the son of each would, according to the Mitákshará law, acquire, by birth, a co-ownership with his father in the ancestral estate; yet, if the argument is sound, this co-ownership would pass altogether from the son of *A* or of *B*, as either happened to die before the other. If a co-parcener should die, leaving no nearer descendant than a great-great-grandson, then the latter would no doubt be excluded at once from inheritance and from partition by any nearer heirs of the deceased, as, for instance, brothers and their sons; but where there has not been such an interval as to cause a break in the course of lineal succession, neither has there been an extinguishment of the right to a partition of the property in which the deceased was a co-sharer in actual possession and enjoyment. Jagannátha in Colebrooke's Digest (B. V. T. 396, Commentary) has discussed an argument on a case almost identical with the one before us. The only difference seems to be that it supposes the son of the original owner to have been separated from his father, and the claim to be set up by his great-grandson to a share in property left undivided in the first partition. "But as for the opinion," he says, "that (the right to a) partition extends only to the brother, his son, and the son of that son, even when co-heirs die successively, and that no (obligation to) partition can exist beyond those with the great-grandson of the late owner's son, may it not be

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asked to whom then would the property belong?" Then meeting the argument from the "literal sense of the precept," already referred to, that the whole property would belong exclusively to the survivor of the two brothers and his descendants, he says that mere reasonings on the literal sense of the text are out of place, "for the several ancestors dying successively, and the property not having been silently neglected during adverse possession, nothing prevents the transmission of it even to the hundredth degree of lineal consanguinity." Each descendant in succession becomes co-owner with his father of the latter's share, and there is never such a gap in the series as to prevent the next from fully representing the preceding one in the succession. It is on the same principle that the seventh in descent in an emigrant branch, can return and claim a partition of the property. He may be a *Sapinda* in the stricter sense of one who was a *Sapinda* of the ancestor in possession. His great-grandfather may have inherited, as fourth in the line, a right which he was then capable of transmitting to the fourth in descent from himself. Here the right stops as amongst those who have not emigrated; it stops at the fourth from an owner in possession, through the operation of a law of prescription. Either there has been a failure of three links of the chain of descent, causing the succession to fall to collaterals, or there has been a "silent neglect" to assert the existing right, which in the fourth or the seventh generation annuls the title (Coleb. Dig., B. V. T. 394, 396, Com.). The passage cited by Mr. Dhirajlāl from Mr. Strange's Manual, and the case there referred to, involve the same view of the Hindu law as the one just set forth, and are opposed to the notion that a division of a Hindu family necessarily occurs in the fourth generation from the common ancestor independently, or even in spite, of the wishes of the several members.

But though no such partition as this by mere operation of law is known to the Hindu system, it is equally clear that that system, like the English, respects an existing possession peaceably acquired, and raises, after the lapse of a considerable time, the presumptions by which it can be supported.

" Possession by strangers for three generations," according to Brihaspati, " gives no doubt an absolute title." In such a case " proof of a fair title," Vyása says, " is not required " (Coleb. Dig., B. V. T. 395, 396) though, where a shorter time has elapsed, the possessor for less than twenty years would have to disprove a *prima facie* adverse title, and one for more than that time a *prima facie* title supported by proof of possession in accordance with it (Ib. T. 384, Com.). The text of Yájñavalkya (B-II. S-124) : " If one see his land in the possession of another and say nothing, it is lost after twenty years, moveable property after ten years," has, by Vijnáneshvara and Nilkantha, been construed in a very forced and unnatural way in order to bring it into accordance with the other texts (V. Mayukha, Ch. II., S. II., para. 6). They say that this lying by involves forfeiture only of the profits of the land. The text really goes to throw upon him, who seeks to disturb a possession held for twenty years with his assent, the burden of proving that the possession was constructively his own. But Nilkantha still limits Nárada's principle, that no length of time can validate a dishonest possession by restricting it to the time " fit for recollection of legal title," and admits that a colour of title is made effectual by three descents (V. M., Ch. II., S. II., paras 2, 3). Amongst *Sapindas* the presumption does not arise so readily (Coleb. Dig., B. V. T. 396), yet, as has been seen, an exclusion from the right to a share is caused by non-possession for three generations, and if this text is to be applied only to undivided property, yet text 384 from the same author shows that by laches an heir forfeits his right of inheritance as against his co-heirs, and a former co-parcener forfeits what he became entitled to on partition. But if he may forfeit the whole, so also a part. Where a partition has actually been made, it is conclusive in the absence of fraud (2 W. & B. 40, 43 ; Coleb. Dig., B. V. T. 377, 378 ; Manu IX. 47). It is not to be re-opened " on the simple allegation of an unfair distribution," and in the case of *Somangoudá v. Bharmangoudá* (a) the Court refused to interfere where the divided

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to the cases collected under *Yard v. Ford*, 2 Williams Saunders 171 C, and to the history of the doctrine given by Cockburn, C.J., in the case of *Bryant v. Foot* (b); and for the Roman law to Von Savigny's disquisition on the subject of "*tempus immemoriale*" in the 4th volume of his system (Ch. III, Sec. 201), and Goudsmid Pandects, Sec. 81, page 224.

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A partition, tacitly effected in the way just considered, is, for practical purposes, identical with the separation constituted according to *Yājñavalkya* by separate possession of house or field. *Brihaspati* and *Nārada* (II. W. and B. XIII. V. Mayukha, Ch. IV., Sec. VII, para. 27) give the separate transaction of affairs as another indication of division. Separation in food and worship and in residence are of less weight in this than in former ages as signs of partition, but should be taken into consideration along with other circumstances. It is a recognized principle that, when a Hindu family has once been proved to have been joint, it lies on those who assert a subsequent separation to prove it. The state of things shown to have existed is presumed to have continued, until the contrary be shown. But it is not inconsistent with this doctrine, and is, indeed, obvious that, as the course of nature itself brings about inevitable changes in a family, the presumption is one which grows weaker at each stage of descent from the common ancestor. Brothers are for the most part united; second cousins are generally separated. After a considerable lapse of time, testimony of the precise terms on which a partition was effected, and of the precise time at which it was made, will, in most cases, be wanting. The presumption that the old state of things continued, is, at some point, met by the presumption that the present state of things had a legal origin, and it cannot be said that the Hindu law, in the form in which it has come down to this generation, looks on all separation of families with disfavor. Many sages point complacently to the increase of offerings that attends the separate performance of family religious ceremonies, and the pressure of modern circumstance tends

(b) L. R. 2 Q. B. 161.

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In the present case, the Subordinate Judge has found "that during the last 50 years the plaintiffs were in possession and enjoyment of some part of the property, and the defendants were also in possession and enjoyment of some and that they never, during that period, rendered accounts of the profits and expenses to each other." No attempt has been made, on appeal, to impugn this statement of the facts. It further appears that no part of the family property, whatever rights existed, was, during that time, actually enjoyed in common, and that as to one village (Borivle), the plaintiffs and the defendants hold, each party, exactly one-fourth of that village, and give separate *Kabuláyuts*, or agreements, for their respective shares of the Government revenue. The defendants appear to have repeatedly mortgaged the moiety of the village of Kolwan, which the plaintiffs claim as family property, without any reference to them. The plaintiffs, even after the institution of the suit, alienated two-thirds, if not the whole, of the village of Kochri, without reference to the defendants or reservation of their rights. This village is the chief item of the disposable family property in the plaintiffs' possession; and, if they did not regard it as exclusively their own, their alienation of it was a fraud on the defendants. The plaintiffs, it is plain, by such a transaction, deprived themselves of the capacity to give up to the defendants in

specie the share which the decree might award them in that portion of the family estate. It is said that the inequality of the value of the possessions, held by the two branches, is a proof that no partition ever took place ; but this inequality, taking it to be as great as the plaintiffs contend, would naturally have led, years or even generations ago, to an insistence, by the plaintiffs, on a more equitable distribution of the joint property, or to a suit for partition. The more obviously unequal the distribution, the more probable it is that it would not have been so long acquiesced in, unless there were good reasons for acquiescence. The evidence of the present value, however, is, by no means, satisfactory ; the estimates of the two parties differ widely, and the evidence does not afford means of arriving at a satisfactory conclusion. How far the present values of the several parcels correspond to their values fifty or seventy years ago, is a matter left entirely to speculation, and it is in part to shut out insoluble questions of that kind that rules of prescription have been established. The conduct of the parties in living apart, in treating their several possessions as solely their own, and in setting up no claim against each other for half a century, affords evidence of a partition which, we think, quite overcomes the presumption, weak as it is in the case of parties so remotely connected, in favor of continued union. Nārada says (I. W. and B. 357) that a separation in transactions for ten years is conclusive of a partition, and though it is said at Pt. II. W. and B. that this rule has not been adopted by the modern commentators, yet it is to be found in the Smṛiti Chandrikā (Ch. XVI., para. 14), though it is there ascribed to Kātyāyana. But without drawing the line of prescription so rigorously as this, or, indeed, laying down any arbitrary rule of general application, we think that, in this particular case, notwithstanding the absence of any written instrument of partition, the balance of probability, on the facts thus far considered, is altogether in favor of division. It is needless, therefore, at this stage, to consider how far the mere neglect to assert their rights on the part of the plaintiffs, independently of any finding on the fact of separation, deprives them of a

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remedy, or whether, as sole possession is *prima facie* proof of sole ownership, the plaintiffs are not bound by limitation, unless they have distinctly proved some act or some state of things, not possibly, but necessarily, referrible to common ownership within twelve years before the institution of the suit.

The document, purporting to be an agreement for a partition of the whole of the family property, drawn up about eight years before the suit and signed by six of the defendants, is put forward as evidence of such an act. Two witnesses depose to the execution of this document, and another says he attested the document as executed by three defendants, who were not present, at their request. Besides these witnesses, four of the defendants depose to the genuineness of their signatures to the document. But of these defendants, Bálkrishna Vishvanáth deposes that when the document was executed, his brothers Shivrám and Keshev, the latter of whom did not sign the document, were separated from him. He deposes that Shámráv, the father of Váránashi, one of the defendants, signed a letter, in which he is contradicted by two witnesses. Sadáshiv Dámodar, another defendant, says he signed the document at the instance of Shámráv, now deceased; but he deposes also that there was a partition a hundred years ago, and that the document, drawn up eight years before the suit, was meant to effect a redistribution, but was never completed. Shivrám Yeshvant, the seventh defendant, deposes to the like effect. The family, he says, has been divided for a century, and the document, drawn up eight years before the suit, was a merely preparatory step towards a readjustment which was never carried out. Another witness also, while he admits the claim, says the families have been separated as long as his memory goes back. There was to have been another final memorandum, he says, on a stamp. As to the letter he agrees with one witness, and contradicts two others.

Upon the whole, it seems most likely that this document, drawn up eight years before the suit, was really executed by the parties, whose signatures it purports to bear. But three

of the alleged co-sharers did not sign it, nor is the evidence, that they joined in the agreement, satisfactory. As to a fourth co-sharer, Shámráv, a separate portion of the estate was given to his daughter Váránashi, one of the defendants, on the express ground that he was a divided member of the family, and to that suit the plaintiff Antáji was an effective party, though the decree did not direct him to give any property to Váránashibái. This consideration must dispose, at the same time, of any effect as against the appellants, except Váránashibái, of the letter written by Shámráv; and as to her it can have no effect, because her relation to the other parties is *res judicata*. The document, drawn up eight years before the suit, being an agreement for a partition or a re-partition if it was effective at all, superseded all the previous relative rights of the parties by a new set which it created or defined. But it is, on its face, defective, as wanting some signatures, the absence of which is not satisfactorily accounted for, and then it is clear that it was never acted on, or attended to by the parties. After, as before, its execution, both branches dealt with their several holdings, as if solely their own. There was no distribution, no rendering of accounts, in accordance with the mutual rights conferred or established by it. There were mortgages and sales quite inconsistent with it. Taking these facts into consideration, we must hold that either the document No. 28 was, as some of the witnesses say, a merely preparatory one, not intended to have force of itself, or else that the agreements contained in it were abandoned, and the rights arising from them renounced by common consent, or through a consciousness that they could not be given effect to by reason of the non-acquiescence of some necessary parties. Looked at by itself, it does not constitute, under the circumstances, a document on which the plaintiffs can now base their claim; while, as proof of a prior state of union, it is more than counterbalanced by its partial execution, by nothing having ever been done under it, and by a course of conduct on both sides inconsistent with its having been regarded as embodying serious and binding engagements.

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Three of the defendants admit the claim of the plaintiffs. The Subordinate Judge, upon this and upon the document drawn up eight years before the suit, has held that the defendants have admitted the union of the family, and that, as the defendants are all united, the admissions of some will bind all. But as to the admissions, such as they are, in this document, these are made merely as a basis for an agreement, one which, as we have seen, was either never regarded as final, or else was forthwith practically repudiated by all parties to it. Such admissions can have no conclusive effect, and appear to be of but very little weight, except when strongly corroborated. The admission of the claim by three of the defendants requires a closer consideration. The members of a Hindu family, sued by other alleged members, cannot be looked on in precisely the same light as partners in a firm each authorized to act as the agent of the others. If they were to be regarded in this way, the action itself, by alleged members against other members, would be inadmissible. It would be opposed to justice and reason, that an embarrassed member of one branch should, through corruption or spite, be able to betray the interests of all his co-parceners into the hands of their adversaries. The admission may bind him who makes it so as to make him joint with the plaintiff, who also asserts the union; but cannot be allowed to weigh against his co-parceners, who deny the union and perhaps prove a partition. As to the admitting defendants, the decree of the Subordinate Judge may be affirmed in this sense that they are to be deemed co-parceners with the plaintiffs, and entitled to share the paternal estate with them while bound to throw their own shares of that property, when ascertained, into the aggregate for partition, but that this is not to affect their rights and liabilities with reference to their co-defendants, or to affect property in the possession of those co-defendants, except so far as these three defendants may establish their right to it by a suit. They will themselves, at the same time, be liable to a suit by their late co-defendants, if they hold property either as divided or as undivided members of a family with them in excess of

what they are entitled to. This is a somewhat complicated process for giving effect to the admissions of these defendants; but it does not seem to admit of simplification, except by discarding their admissions altogether, which would be contrary to the usual practice, however conformable it might be to justice in the particular case. As between them and the plaintiffs, these defendants are to be regarded as united with the plaintiffs; as between them and their co-defendants, this union is not to be taken as adjudicated; as to union or division subsisting between the three and their present co-defendants for the purposes of any other suit, it is not to be understood that any judgment is given, but simply that their property, such as it may be, goes with them into the plaintiffs' family.

With this exception, the decree of the Subordinate Judge must be reversed. Costs throughout on the plaintiffs.

NA'NA'BHA'I HARIDA'S, J. :—One set consisting of three defendants, answered that they were willing to effect a partition and were unnecessarily sued. They, in fact, admitted the plaintiff's claim.

The other set, consisting of nine defendants, among other things, answered that the claim was barred by the law of limitation; that they had been separate from the plaintiffs for upwards of thirty years; and that this suit was the result of a conspiracy between one of the defendants, who admitted the plaintiffs' claim, and the plaintiffs.

The Subordinate Judge, on remand from the High Court, held, *inter alia*, that the suit was not barred, and that the property in dispute was joint ancestral property. He, accordingly, made a decree for partition thereof on the 4th September 1872, the one now in appeal before us.

Passing over as unimportant the objections, preliminary and otherwise, which were urged, as to the valuation of the appeal and of certain items of the property comprised in the plaint, but which do not affect the merits of the case, it seems to me that the substantial questions raised in the numerous

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 MORO VISA- in the memorandum of appeal, as argued before us, resolve
 VANA'TH themselves into—
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1st.—Whether this claim is barred by the law of limitation ?

2nd.—Whether the plaintiffs are entitled to demand a partition at all, assuming them to be members of an undivided family ?

3rd.—Whether they are members of an undivided family ? and

4th.—What share, if any, are they entitled to ?

It seems to me that a good deal of the argument on the questions of bar under the law of limitation might have been spared. It is admitted that a portion of the property, of which partition is sought, is now in the possession of the plaintiffs, and another portion of it in that of the defendants ; so that, if the plaintiffs and defendants are still members of an undivided family, the suit cannot be held barred under Cl. 13, Sec. 1, Act XIV. of 1859, the law of limitation governing this case ; *Sakho Náráyan v. Náráyan Bhikáji (c)* ; *Sookh Lal v. Goolzar (d)*. On the other hand, if they do not now bear that character, no partition suit can at all lie between them, except under certain specified circumstances, which are not alleged to exist in this case, and the question of limitation under the Act, therefore, becomes immaterial.

The next question, however, whether, assuming them to be undivided, the plaintiffs are entitled to sue at all for partition according to Hindu law, is one of considerable importance and difficulty. Learned and ingenious arguments, based upon various original texts, have been addressed to us by the able pleaders on both sides. The plaintiffs and defendants are admittedly descendants of one common ancestor, Uddhav. The defendants are all fourth in descent from him. The plaintiffs, however, are, some fifth, and others sixth in descent

(c) 6 Bom. H. C. Rep. A. C. J. 238.

(d) 14 Calc. W. R. Civ. R. 223.

from him ; and hence, it is urged, the latter cannot claim from the former any partition of property descended from that common ancestor.

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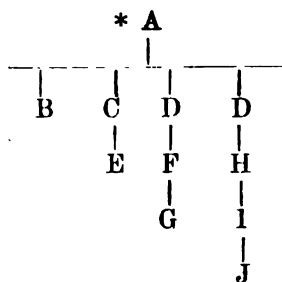
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It is argued for the appellants that, since the fifth and remoter descendants are, by the law of inheritance, postponed to the fourth and nearer descendants, (between whom and them, moreover, other relations may intervene,) the former are not co-parceners with the latter, and cannot, therefore, demand a partition from them. In support of this contention are cited the passages of Kátyáyana and Devala, quoted from the Viramitrodaya in 2 W. and B's Dig., Introduction, III., IV. ; Manu IX., 186, with Kulluka's comments on it ; Nanda Pandita's Comments on Devala ; Aparárka on Yádnya-
valkya ; Vyavahára Mádhava ; and Kamalákar. Devala's passage, it is urged, applies to divided and re-united as well as to undivided families, and not only to the former according to Nilakantha, who regards, by a forced construction, the word *Avibhaktavibhaktánám* as a *Karmadháraya* in the sense of *those who having been divided have again become undivided* [or re-united], instead of as a *Dvandva*, in the sense of *divided or undivided*, as one naturally reads it, all the authorities being opposed to Nilakantha on this point. It is further urged that the law of partition is inseparably connected with, and is, indeed, a part of, the law of inheritance, which is clearly founded on the spiritual benefit which certain persons, according to the religious ideas of the Hindus, are supposed to be capable of conferring on the deceased by the gift of the funeral cake ; that this capacity of benefiting the deceased does not extend beyond the fourth in descent, for Manu says, Chap. IX., 186, "but the fifth has no concern with the gift of the funeral cake ;" that this is made clearer by Kulluka in his commentary ; and that as the fifth cannot inherit during the lifetime of the fourth in descent, so neither can he claim any partition from the latter. It is also urged that, according to Nanda Pandita : "Up to the fourth alone are the Kulyas called Sapindas," and that "the great-grandson's son gets no share ;" that according to Aparárka, whose authority is recognized by Colebrooke, Stokes

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177, "Up to that (*i.e.*, the fourth) the *Kulyas* are *Sapindas* after which the *pinda* relationship ceases;" and that according to Vyavahár Mádhava "after that [*i.e.*, after the great-grandson,] there is always a stoppage of the division of the wealth of the great great-grandfather."

To this it is replied that the authorities quoted do not support the contention of the appellants; that the doctrine of ancestral property vesting by birth in one's son, grandson, and great-grandson, was overlooked by the other side; that if A died, leaving two or more sons forming an undivided family, and they died each of them, leaving one or more sons, and the same thing happened regularly for several generations, all the descendants of A, living in a state of union, as in this case, the authorities quoted did not prevent any of such descendants below the fourth demanding a partition of



their joint family property: (See Str. Man. S. 347); that they only went so far as to lay down that, if * A die, leaving B, a son, E, a grandson, G, a great-grandson, and J, a great-great-grandson, the intermediate persons having all predeceased him, J, who stands fifth in descent from A, cannot demand a partition of A's property, because J had not

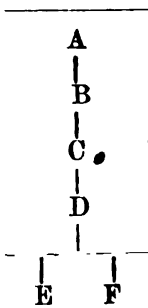
vested in him by birth any interest in such property; that the same view of the texts cited was adopted by the learned authors of the Digest (W. and B. Bk. II. pp. II., IV; see also Stokes 53, 54, 515, 516, and 517); that the right to participate does not necessarily cease at the 4th descent; see Stokes 290, 291; that the expression *Avibhaktavibhaktánám* in the text from Devala must be taken to be a *Karmadhāraya* compound, as Nilakantha takes it, and not a *Dvandva*, for otherwise the word *bhūyo* (again), which implies a previous partition, becomes inapplicable to one member of that compound; that Nilakantha's authority on this side of India is entitled to more respect than that of Nanda Pandita or of Aparārka; that, if Nilakantha is right in his interpretation

of Devala, the text, which apparently limits the right of partition to the fourth in descent, refers only to cases of re-united co-parceners and not to undivided ones ; that, there being no question here of partition among re-united co-parceners, the text from Devala does not apply ; that in an undivided family *Sapinda* relationship extends to the seventh and in a divided and re-united one only to the fourth, in descent from the common ancestor ; that one of the original plaintiffs, who was fourth in descent from Uddhav, the common ancestor, and died pending the suit, is now represented by his two sons, and that, the whole of the property being still the undivided property of the family, any of the co-owners may compel a partition of it.

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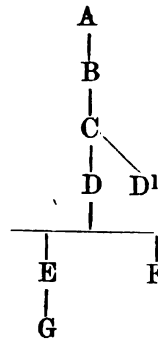
This is a mere summary of the arguments addressed to us on this part of the case. Upon a consideration of the authorities cited, it seems to me that it would be difficult to uphold the appellants' contention that a partition could not, in



any case, (other than that of absence in a foreign country) be demanded by descendants of a common ancestor, more than four degrees removed, of property originally descended from him. Take, for instance, the case put in the margin : A, the original owner of the property in dispute, dies, leaving a son B and a grandson C, both members of an undivided family. B dies, leaving C and D, son and grandson, respectively ; and C dies, leaving a son D and two grandsons by him, E and F. No partition of the family property has taken place, and D, E, and F, are living in a state of union. Can E and F compel D to make over to them their share of the ancestral property? According to the law prevailing on this side of India they can, sons being equally interested with their father in ancestral property ; 1 Str. H. L. 177 ; 2 Ibid. 316 ; Mit. Ch. 1 Sec. I., 27, and Sec. V. 3, 5, 8, and 11 ; Yav. May., Ch. IV., Sec. VI., 13.

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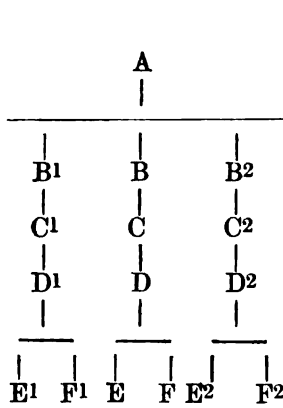


In the same way, suppose B and C die, leaving A and D members of an undivided family, after which A dies, whereupon the whole of his property devolves upon D who thereafter has two sons E and F. They, or either of them, can likewise sue their father D for partition of the said property, it being ancestral.

Now, suppose B and C die, leaving A, D, and D¹, members of an undivided family, after which A dies, whereupon the whole of his property devolves upon D and D¹ jointly, and that D thereafter has two sons E and F, leaving whom D dies. A suit against D¹ for partition of the joint ancestral property of the family would be perfectly open to E and F, or even to G and F, if E died before the suit. It would be a suit against D¹ by a deceased brother's sons or son and grandson : Vyavahāra Mayukha, Chap. IV., Sec. IV., 21.

But E and F are both fifth and G sixth in descent from the original owner of the property, whereas D and D¹ are only fourth.

Suppose, however, that A dies after D, leaving a great-grandson D¹ and the two sons of D, E, and F. In this case E and F could not sue D¹ for partition of property descending from A, because it is inherited by D¹ alone, since E and F, being sons of a great-grandson, are excluded by D¹, A's surviving great-grandson, the right of representation extending no further. See Jagannātha's Comment on Text CCCLXX. at 2 Colebrooke's Dig. 512, 517; 1 Norton's L. C. 299; Str. Man. Sec. 323; 2 Str. H. L. 327.



Introducing B¹, C¹, D¹, E¹, and F¹, and B², C², D², E², and F², as additional descendants of A, all forming an undivided family, might render the case a little more complicated and affect the value of their shares, but could not destroy the right, if any, of E and F to share the joint family property with the other members.

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The rule, then, which I deduce from the authorities on this subject, is not that a partition cannot be demanded by one more than four degrees removed from the acquirer or *original owner* of the property sought to be divided, but that it cannot be demanded by one more than four degrees removed from the *last owner*, however remote he may be from the original owner thereof. [In addition to the above authorities, consult 1 Norton's Lr. C. 292; 2 Colebrooke's Digest, Text CCCLXIX, page 479; also pages 512, 515; Str. Man. Sec. 347.]

If it were necessary, therefore, in this case to determine this nice question of Hindu law, I should feel inclined, in the absence of any precedents to the contrary, to hold the plaintiffs not precluded from suing for partition by reason simply of their distance from Uddhav from whom the property in question has, as admitted, originally descended. But it is not necessary to determine it, as the appeal to us can be satisfactorily disposed of on the 3rd point; and hence the question, whether the disputed compound *Avibahktavibhaktānām* in Devala's text should be interpreted as a *Karmadhāraya*, according to Nilakantha, or as a *Dvandva*, according to the other authorities, must remain an open question to be mooted again when a proper case arises. I may state, however, that I perfectly agree with the learned authors of the Digest in their view of the matter.* It is more natural

* West & Bühler Bk. II., pp ii-iv.

1873. to regard it as a *Dvandva* compound. Regarding it as such, Devala may be taken to lay down a general rule for all "Kulyas* residing together," 'undivided [or] divided' [and re-united]. This view is, indeed, open to the objection urged against it, that the expression *bhūyo* 'again' or 'further' necessarily implies a previous partition among the 'Kulyas residing together,' which would be a contradiction in terms to predicate of them if 'undivided.' But it must be observed that critical eyes not unfrequently discover inaccurate expressions in all literary compositions, in metrical ones more especially; and that both Jagannātha and his translator Colebrooke, no ordinary authority on such a subject, regard that expression as applicable only to one member of that compound and not to the other : 2 Digest, Book V., Text LXXXI; Jagannātha says, "second (*bhūyo*) does not relate to a partition among 'undivided' parceners, for it is a rule that an epithet which is liable to objection is superfluous." And it must also be observed that, besides Nilakantha's construction being forced, it seems liable to another and, perhaps, a graver objection, that it leaves a whole class of cases unprovided for, namely, cases of families which have continued joint for more than four generations. If the text of Devala does not refer to such families, but only to re-united ones, as Nilakantha interprets it, there seems to be no limitation whatever as to the right of partitioning property owned by them ; and, accordingly, any descendant of the common ancestor, however remote, may demand a partition from any other however near. This does not seem to harmonize with the law of inheritance, which restricts the right of representation to the great-grandson, and, in his absence, prefers a number of other relatives to the great-great-grandson. Besides, Devala must be taken to be the best interpreter of his own meaning, and we find another text of his, not noticed by Nilakantha, which, on being compared with the other, shows clearly that the text relied upon by the latter (1) was never intended by the former to be restricted to re-united
- * Men of the same family.
- (1) 2 Dig. Bk. V. Chap. II., LXXXI.

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families. It is as follows :—"So far, namely, as far as the fourth in descent relatives are Sapindus or connected by funeral oblations; beyond him the funeral cake is rescinded: sages declare partition of inheritable property to be co-ordinate with

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the gift of funeral cakes" (2). From this last clause, in which Devala states the reason of the law restricting the right to the fourth, it is evident that Devala is not speaking specially of re-united families.

Again, the interpretation, put by Nilakantha upon the text of Devala, does not agree well with the texts of Brihaspati given at 2 Dig. 511, 512, some of these are cited by him (Stokes 54, paras. 23 and 24) and he says they refer to persons living in the same district; "because, where they reside, in different districts, it will descend even to the fifth, as is declared by Brihaspati in treating of residence in other lands: 'Be he the third person, or the fifth, or even the seventh, [that is, in the second, or fourth, or even in the sixth degree,] he shall receive the share that gradually descends to him, on full proof of his birth and family name'" (3). Brihaspati is

here admittedly providing a rule for persons residing in a foreign country. They need not necessarily be re-united. They may be either undivided or re-united. There is no warrant for saying Brihaspati's rule is only for re-united persons. On the contrary, Brihaspati himself, in another text on the same subject, also not noticed by Nilakantha, declares, "*whether a partition be or be not made*, whenever an heir appears, and the property descended to parceners, he shall receive his share," showing clearly that he does not mean to exclude from his rule undivided persons residing in a foreign country. Nilakantha's interpretation is, moreover, opposed to the express terms of the text of Kátyáyana cited by him, for it lays down the same rule as

(4) Stokes 53.

(5) Ibid 54.

Devala, commencing "should a younger son die before partition," &c. (4). This rule, too, not to be inconsistent, Nilakantha says, (5)

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As observed before, it is not, however, absolutely necessary to decide the second point shortly discussed above; for the view which I take of the evidence recorded, enables me satisfactorily to dispose of this case without pronouncing any decision on it. The Subordinate Judge finds, and the evidence in the case perfectly justifies him in finding, that the parties have been *living separate* for upwards of 50 years; that they have had *separate dealings*; that they have been *separate in food and worship*; and that they have been in *possession of separate portions of the property* now in dispute. It also appears from the evidence that during all that time their *earnings and expenditure* have been *separate*, that they have *separately dealt* with the *separate properties* in their respective possession as *their own* exclusive properties; and that they have *never rendered accounts* of profits and expenses to each other. All these facts may be taken as clearly established upon the evidence of reliable witnesses, whose ages vary from 42 to 72 years, and all of whom say they have witnessed this state of things among the parties ever since they remember. Such being the case, are we to regard them as members of an undivided family? The Hindu law, no doubt, presumes every family to be joint; but the strength of this presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker: 2 Str. H. L. 347.

Such presumption, then, in this particular case must be very weak indeed; and the question is, has it been rebutted by the evidence recorded? It would be difficult to hold it

* See on this subject 10 W. R. 148; Grady's H. L. 279, 282; 17 W. R. 210; 7 Har. 372; 3 B. H. C., A. C. J., 173; 3 B. L. R., P. C., 41; S. C. 12 W. R., P. C., 40; Elb. S. 210; 1 Beng. S. D. A. R. 13; 2 Str. H. L. 387, 395, 398; Steele 56, 213; West and Bühler, Book II. 68, 69; 2 Dig. 491, 493, 496, 497, 503, 504; Vyav. Darp. 541, 544; 1 Str. H. L. 226—29.

† See 2 Dig. 486; Stokes 51, 380, 381; 1 Morl. Dig. 24, pl. 108; West and Bühler, Bk. II. 33, 45, 46; *L. M. Pitchama v. L. M. Gooruppa*, Mad. Sudder Court, Dec. 1859, p. 84; 2 S. D. A. N. W. P. Sel. Rep. 69; 1 Norton's L. C. 308.

has not. The abovementioned facts, each and all,* point very strongly to an actual partition at some remote period, of which the absence of any direct evidence now cannot reasonably be considered to tell against it; and the Subordinate Judge would have himself found partition among the parties, if he had not fallen into the error that the same could not be legally inferred from those facts, "unless it were proved that they have held possession of *separate portions* of the family property *equal* to their shares." This, however, is not necessary; for at a partition each co-parcener, though entitled, is not bound to take property equal to his share. So that, if when an actual partition takes place, he chooses to be content with less than what he might, if so inclined, insist upon having as his share, it cannot be afterwards permitted to him or his successors to deny the fact of such partition and base such denial upon proof that the property in his or their possession is less than his or their share. The question in each case of disputed partition is pure and simple, partition or no partition. If partition is proved, the inequality of the shares in their possession at any particular time is perfectly immaterial.† It is final and cannot be re-opened, except in a case of fraud or mistake, or subsequent recovery of family property, and none such is alleged here. "Once is the partition of inheritance made; once is a damsel given in marriage, and once does a man say I give:" these three are by good men done once for all *and irrevocably*—Manu IX., 47. The facts shortly set forth above, leave no doubt that a partition did take place in the family at some remote period of time beyond the reach of living memory. The plaintiffs, no doubt, contended that it was merely for each other's *convenience* that they dined separate and held properties separate. But the

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onus of proving this lay upon them : 1 B. H. C. 43; and they have entirely failed to prove it. There is, it must be noticed, some evidence on the plaintiffs' side, that some of the defendants, by their conduct in 1856, admitted the existence of union at that time. Exhibit No. 28 is a document, signed by some of the defendants, in which they agreed with the plaintiffs to make a division of what they respectively had in their possession. This document cannot be taken to have any value as against those defendants who have not signed it, and even as against those who have signed it, it does not operate as an estoppel. It appears, as they say, that it remained incomplete and was never carried out, but tacitly abandoned by all the parties to it, the plaintiffs themselves never having attempted to enforce it, and having, moreover, subsequently *sold some property*, which was in their possession, treating it as solely their own. Upon the whole, the evidence for the defendants in support of a partition seems to me greatly to preponderate over that for the plaintiffs, having due regard to the presumption of Hindu law that a family is united until the contrary is proved ; and I would, accordingly, if there were no special reason for acting otherwise, reverse the decision of the Lower Court with all costs upon the plaintiffs. But in this case there is such a special reason. Some of the defendants have admitted the plaintiffs' claim and have shown a desire to be regarded as their co-parceners ; and they have not appealed against the Subordinate Judge's decree. It is only just, therefore, to allow the plaintiffs to effect a partition with them of any ancestral property in the possession of either ; and I, accordingly, concur in confirming the Subordinate Judge's decree, so far as it affects the said defendants, reversing it with costs as to the other defendants.

Decree amended accordingly.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 4 of 1873.*1873
October 2.VA'SUDEV PANDIT *Plaintiff and Appellant.*THE COLLECTOR OF PU'NA... *Defendant and Respondent.**Act XI. of 1852—Inam Commissioner's decisions.*

The Inam Commissioner's decisions, under Act XI. of 1852, on matters falling within his jurisdiction, are final, except when, and as modified by an appeal to Government in its judicial capacity under the Act; and binding not only upon the *Inámdar*, but upon the Government itself in its executive capacity: and where a Government officer infringes the rights of an *Inamdar* thus determined, an action lies against him in the Civil Court.

THIS was a special appeal from the decision of R. H. Pinhey, Judge of the district of Púna, confirming the decree of M. B. Baker, Assistant Judge.

The facts of the case are briefly these:—

The British Government, by their representative, Sir Thomas Munro, granted in 1818 the village of Kerur, in the Bolgaum Collectorate, as *Inám* to Bháu Máháráj, the plaintiff's ancestor. In 1838 the Government were pleased to effect an exchange between that village and the village of Vadgam in the Púna district, and a *sanad* was duly issued by Mr. Mill, the Collector, granting to Tátíá and Dádá, the sons of Bháu Máháráj, "the village of Vadgam, including the garden and pasture lands and the stream in *Inám*, on the same footing as the grant of Kerur." Under the provisions of Act XI. of 1852, the *Inám* Commissioner instituted inquiries with respect to the village of Vadgam, and determined that "the whole of that village, excepting only the rights and privileges of ancient *Hákdárs* and *Inámdárs*, should be continued in *Inám* to the male descendants of Bháu Máháráj." In 1869 the Collector of Púna opened a

1873 <hr/> VASUDEV PANDIT v. THE COL- LECTOR OF PU'NA.	quarry, and removed some stones and sand from Vadgam. The plaintiff, therefore, sued him in the Assistant Judge's Court to recover damages, and obtain an injunction, restraining the Collector from interfering with the plaintiff's proprietary rights.
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Both the Courts below rejected the plaintiff's claim on the ground that the grant of the village of Vadgam did not include a proprietary title to the bed of the stream from which the stone and sand were removed, but gave to the plaintiff only the revenues of the village.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Bahiravnáth Mangesh for the special appellant, the original plaintiff:—The real question in this case is not what was granted to the plaintiff under his *sanad*, but what was determined by the Inám Commissioner to have been granted under it; for the determination of the Inám Commissioner is conclusive, and cannot be avoided by the Civil Courts: Act XI. of 1852. According to the proper construction of the *sanad* itself, the whole village, including the lands, is granted, and not merely the revenues. The only exception is made in favour of petty *Hákdárs* and *Inámdárs*, who have in a measure acquired prescriptive rights. The grantees have besides agreed to pay a *nazaráná*, in consideration of which the Government have conveyed to them absolute proprietorship of the entire village.

Dhiraajál Mathurádás, Government Pleader, for the respondent:—The decision of the Inám Commissioner is not conclusive. The Government can always resume grants; and by their action in opening the quarry and defending this suit they have shown their intention of resuming a part of what they had given, even supposing that they had given the whole village without any reservation. But the Inám Commissioner could not grant more than what had been granted to the plaintiff by Mr. Mill's *sanad*, which conveys

the revenues only. At any rate, no suit lies against the Government : Regulation XXIX. of 1827.

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The judgment of the Court was delivered by WEST, J:—The judgments of the Courts below in this case have proceeded upon their interpretation of the grant made to Bháu Máharáj by Sir T. Munro in 1818, confirmed by the Honourable Mountstuart Elphinstone, of the village of Kerur in the Southern Maratha Country, and of the subsequent grant of the village of Vadgam in the Púna District in exchange for Kerur. The latter grant refers to the former and embodies its terms. If we felt ourselves free to dispose of the case on a construction of these documents, we should have considerable difficulty in saying that they were meant to convey more than the revenue arising from the village. The view taken by the Courts below was, that their operation was thus limited, and this appears to be supported by the case of *Váman v. Collector of Tháná* (a) and the case of *Krishnaráv Ganesh v. Rangráv* (b) there referred to. But the disposal of the present case is to be governed by wholly different considerations—considerations which we cannot but think would have had a decisive effect in the District Court, had they been duly pressed upon the attention of the Judge presiding there. The rights of the *Inámárá* have been weighed and adjudicated on by the Inám Commissioner under Act XI. of 1852. The duty of that officer, as laid down in Rule 1 of Schedule A to the Act, is “to investigate * * * the titles of persons holding or claiming against Government the possession or enjoyment of Ináms or Jahgeers, or any interest therein, or claiming exemption from the payment of land revenue.” According to Sec. 7 of the Act, “no decision or order of the Inám Commissioner * shall be questioned or avoided in any Court of law.” His judgment is final on the matters that fall within his jurisdiction, and by Rule 13 of Schedule A “Decisions affecting any lands, or any interests therein, passed under this enactment shall be carried into execution by the Collector or

(a) 6 Bom. H. C. Rep. A. C. J. 191.

(b) 4 Ibid 1.

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chief revenue authority of the district in which the lands to which they relate are situated, at the requisition of the Inám Commissioner or his Assistant, in any manner which may from time to time be prescribed by the Governor of Bombay in Council." The Inám Commissioner's decree of 1859, therefore, which is contained in a document which we have before us, is conclusive as to the rights of the *Inámdár* as against the Government. The document containing the Collector's intimation to the *Inámdár* of the terms on which he is thenceforth to possess and enjoy the property to which it relates, must be taken, as against the Collector, to be an execution of the Inám Commissioner's decree in the manner prescribed by Government.

The real question for decision thus becomes : What was it that was awarded to the *Inámdár* by the Commissioner and placed in his possession and enjoyment by the Collector ? What the reasons were, which moved the Inám Commissioner to such or such a decision, and whether they were logically sound ones or not, are not matters that can be controverted in any other Court. The judgment of the Inám Commissioner, after a statement of the circumstances under which the village of Vadgam had come into the possession or *vahivát* of the claimant, Tátíá Máharáj, and of the authority vested in the grantor (Sir T. Munro) of the village taken in exchange for it, proceeds to award to the *Inámdár* the whole village saving only the rights of the ancient (or prescriptive) *Hákdárs* and *Inámdárs*. The words employed are *báki darobast gáv chálvává* : " Let the whole remainder of the village continue " (in the enjoyment or possession of the *Inámdár's* family); and these words, following the express exception of the charges in favour of *Hákdárs* and petty *Inámdárs*, would naturally be construed as an adjudication of all proprietary rights free from exceptions of any kind, except those specified. But further, the order purports to be made under Schedule B, Rule I. of the Act. That rule is as follows :—

" All lands held under a specific and absolute declaration by the British Government, or any competent officer acting

under it, that they were to be continued hereditarily or in perpetuity exempt, wholly or partially, from the payment of revenue, are to be so continued, according to the purport of such declaration."

What it refers to is the right to hold lands, not to collect revenue, and the two things, besides being easily distinguishable in their own nature, are separately specified in Schedule A, Rule I. of the Act, as matters for the investigation of the Inám Commissioner. When, therefore, with express reference to a rule applicable only to lands, he says that, saving particular charges, the whole village is to go on, or for the future be in the possession or enjoyment of the *Inám*dár's family, we must necessarily construe this order as adjudging the lands and not merely the revenues of the village to the claimant. A minute specification of the several items comprised, or meant to be comprised, in the aggregate awarded, is not to be looked for in the final order of a tribunal, before which the claimant was not allowed to argue his own case out, and could not be represented for this purpose by an advocate. However, it may have been early in the century, it is certain that by the year 1859 the value of the rights of Government, apart from the right of taking revenue from the holders of land for agricultural purposes, was thoroughly understood. Questions suggesting the distinction between the two must have continually arisen in the inquiries conducted by an Inám Commissioner, and no reasonable doubt can be entertained that, when the whole village was awarded to Tātiá Máháráj, nothing less than the whole was really meant, saving only the charges on its proceeds expressly excepted.

The order (21) issued in June 1861, is not only consistent with this view of the Inám Commissioner's award, but seems inconsistent with any other. "The village of Vadgam," it says, "has been (granted to or) held in *Inám* by you."

* * "The Inám Commissioner has passed an order continuing the enjoyment of the said land to you hereditarily." Then, after stating the inconveniences of a tenure dependent

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on lineal succession, the Collector continues: "In order to remove these obstacles, the Government has resolved to take an annual *nazaráná* of one anna per rupee on the assessment" * * "and to raise no objection to (the treatment or enjoyment of) the said land as private property by yourself, your heirs, &c." Further on, the payment of 'occasional' is allowed as a substitute for the 'annual' *nazaráná*: and if this alternative be adopted, it is said that "whenever there shall be a transfer of the land from the possession of one person to another, notice will have to be given to the Government." To what "land" do these expressions apply, or can they apply except to the land of the village? And what ground is there for a distinction amongst the several portions of that land? What the Inám Commissioner had awarded was the "whole village"; what the Collector gives over, or abandons all claim to, is the land, which he identifies with the village. Not a word is said about a limitation of the grantee's rights to the collection of the Government revenue, either in the award or in the order or intimation based on it.

Another point in the case is that the reduction of the estate to the condition of purely private property is proffered by the Collector in consideration of an undertaking for the payment of the annual *nazaráná*. A rejection of this offer had to be intimated within two months; otherwise it was to be held accepted. It is stated and not denied that no rejection was intimated, and the acceptance of the proposed terms constitutes a good consideration for the advantages held out in exchange for it—ownership of the land comprised in the "whole village" subject to an annual payment of one-sixteenth of the full assessment on the same land. The whole of the village, that is, the whole of its lands, having been thus recognized as the private property of the *Inámdár*, it was an invasion of his rights to quarry stone, or take sand from within its circuit, without his permission or a right derived from him. He has claimed Rs. 100 for the injury inflicted on him, and it has not been contended before us that, sup-

posing his right to be established, the damages claimed for the infringement of that right are excessive. It is not necessary, therefore, to send the case back for a precise appraisal of their amount at an expense, probably, exceeding any advantage that might thus be obtained. We shall, therefore, award to the plaintiff the amount claimed.

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An argument was raised against the jurisdiction of the Civil Courts in this case on the provision of Regulation XXIX. of 1827, which excludes from their cognizance all claims against Government on account of *Ináms*. By taking the land in this case, and by defending the action, Government, it was urged, has pronounced that so much of the pretended *Inám* as it has appropriated is not really *Inám* property and its action cannot be reviewed by the Civil Courts. But the intention of the Regulation was not to exclude *Inámdárs'* claims from all adjudication whatever. Chapter X. of Regulation XVII. of 1827 made provision for the trial of such claims by the Collector, before whom the claimant in each case had a right to appear and sustain his cause. It was the right of appeal to the Zillah Court under Sec. 49 and that only which was withdrawn by Regulation XXIX. of 1827. Act XI. of 1852 replaced the Collector by the *Inám* Commissioner. The advantage of an open inquiry and the liberty of refuting the evidence that told against him were withdrawn from the claimant. He had to abide by such an adjudication as the intelligence of the Commissioner, unaided by argument, might enable him to pronounce, by such an execution of the decree as the Government might prescribe. But the new law having been once thus carried out, the Government was *functus officio*. The law solemnly enacted was meant to have effect as law, and when Government, in its legislative capacity, constituted the *Inám* tribunal and declared its decrees final, except when and as modified in appeal under the Act, it submitted itself, in its executive capacity, to the decisions of that tribunal. If, indeed, it were at liberty to treat the decision of the *Inám* Commissioner as binding on the *Inámdár*, but not on itself,

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the whole proceeding would be no more than a cruel mockery. The unfettered discretion, which Mr. Dhirajlál claims for the Executive under the Act, could equally and less invidiously have been exercised without it. The claim to an *Inám* has, in this case, been actually adjudicated on. The land has been constituted "private property," and for the Collector's invasion of this "private property," the Civil Courts must provide a remedy, as in the case of any other trespass. The Government, indeed, must not be considered in a matter of this kind as identifying itself with the Executive officer who does a wrong rather than with the tribunal which tries the complaint of the person injured. By expressly subjecting Collectors to the Civil Courts for official acts (Regulation XVI. of 1827, Sec. 6) it identifies itself for the announcement of its higher will with the Courts, not with the Executive officers, and thus the Collector, whom the Courts find to be a trespasser, must be deemed, not only to have infringed some abstract law, but to have disobeyed the commands of Government in its legislative and all controlling capacity.

We reverse the decrees of the Courts below, and award to the plaintiff the amount claimed with costs in all Courts.

Decrees reversed and claim awarded.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 194 of 1873.*1873
September 23.BA'BA'JI.....*Plaintiff and Appellant.*ANNA'.....*Defendant and Respondent.*

Acts XVI. of 1838 and Bombay V. of 1864—Decisions of the Court of the Mámlatdár—Suit for possession in opposition to Mámlatdár's decision—Limitation.

An order of the Court of the Mámlatdár under the last clause of Sec. 1 of Bombay Act. V. of 1864, recognizing the possession of a party and enjoining others from disturbing that possession, is not an order under Act. XVI. of 1838; and the limitation of three years, prescribed in Article 7 of Sec. 1 of Act. XIV. of 1859, does not apply to a suit brought to establish a right against the operation of such an order in the regular Civil Court.

Although such an order of the Mámlatdár is a summary decision, the suit in the Civil Court is not a suit to set aside the order itself, but for possession in opposition to that recognized by the Mámlatdár's injunction and is not, therefore, within the limitation of one year, prescribed by Article 5 of Sec. 1 of Act XIV. 1859.

THIS was a special appeal from the decision of R. F. Mactier, Judge of the district of Satará, confirming the decree of the Subordinate Judge of Ashtá.

The plaintiff Bábáji, sued his brother, Anná, in October 1871, to recover a piece of land, the possession of which, in 1865, was provisionally recognized by the Mámlatdár to be in the latter. Anná, *inter alia*, pleaded that the suit was barred by the statute of limitation. The Courts below considered the limitation of three years under Section 1, clause 7 of the statute to apply, and rejected the claim as barred.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDAS, JJ.

Shántarám Náráyan for the appellant:—In order to see what provision of the Limitation Act applies to this suit,

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we must see exactly what the nature of it is. The suit arises in consequence of certain proceedings held before the Court of the Mámíatdár in 1865. In that Court, the present defendant complained that a disturbance of his possession had been attempted by the present plaintiff, and prayed for an injunction, directing the latter to refrain from causing that disturbance. The Mámíatdár could not take notice of this complaint under Act XVI. of 1838, as he had no jurisdiction. The jurisdiction to issue an injunction in such a matter, is a new jurisdiction, vested in the Mámíatdár by the last clause of Sec. 1. of Bombay Act V. of 1864. Even if this were not so, the Mámíatdár could not have acted in the matter under Act XVI. of 1838, and here there was no such reference. It is clear, therefore, that the Mámíatdár, when he took notice of this complaint, and recognized the defendant Anna's possession, he did so under the Act of 1865, and, consequently, the limitation of clause 7, Section 1. of Act XIV. of 1859, which, in clear terms, refers to an order under Act XVI. of 1838, does not apply.

Rávsáheb V. N. Mándlik, contra:—The increase of jurisdiction given to the Mámíatdárs' Court by Act V. of 1864, did not change the constitution of that Court. It was before the Act a Civil Court, and is so now: *Máhádáji v. Sonu (a)*. But supposing it were otherwise, it has been held that a Mámíatdár's decision is a summary decision, and, therefore to a suit to set it aside, the limitation of one year under clause 5 of Sec. 1 of the statute applies. Special Appeal No. 25 of 1873, *Bhajeant v. Gangábái*, decided on the 7th of August 1873 by MELVILL and PINHEY, JJ.

Shántabáim in reply:—This suit is not to set aside the Mámíatdár's order, but to establish a right to possession in opposition to it.

WEST, J.:—It has been decided by the case of *Máhádáji v. Sonu (supra)* that a Mámíatdár's is a Civil Court. Special

Appeal No. 25 of 1873* has decided that the orders of this Court restoring a person dispossessed to his possession, are orders made under Act XVI. of 1838. As such they prevent the recovery of the property to which they apply through the operation of clause 7 of Sec. 1 of Act XIV. of 1859, unless a suit be brought within three years from their date. By the same decision, however, it has been ruled that the jurisdiction granted by the last clause of Sec. 1 of Bombay Act V. of 1864 is a wholly new one. An order made in the exercise of this new jurisdiction, is not one made under Act XVI. of 1838, and the limitation, prescribed by clause 7 of Sec. 1 of Act XIV. of 1859 does not apply to a suit brought to establish a right against the operation of such an order.

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But, it is said, if the Mámlatdár's injunction against disturbing possession is not one under Act XVI. of 1838, it is a summary order not otherwise expressly provided for, and, therefore, causing clause 5 of Sec. 1 of Act XIV. of 1859 to bar any suit instituted to get rid of its effect after the lapse

**Note.*—In this case MELVILL J., said:—"It has been contended for the appellants that the claim is barred by cl. 7, Sec. I., Act XIV. of 1859, inasmuch as the respondents are bound by an order respecting the possession of the property made by the Mámlatdár more than 3 years before the institution of the suit. The order in question purports to have been made under Bombay Act V. of 1864. That Act empowered the Mámlatdárs' Courts to give possession under Sec. I., cl. 2 of Act XVI. of 1838, and also to interfere by injunction in cases in which there had been no actual dispossession, but in which a disturbance of possession is attempted. The latter provision is a new one, and the order contemplated by it is one which could not have been made under Act XVI. of 1838. In the present case, the order made by the Mámlatdár appears to us to be not of the nature of an order to restore possession, but to be an injunction not to interfere with existing possession. In other words, it is an order made under the new provision of Bombay Act V. of 1864, and not under the old provision of Act XVI. of 1838, and it seems to us impossible to hold that clause 7, Sec. I of Act XIV. of 1859, which applies to orders made under Act XVI. of 1838, can be extended to orders of a different character made under a subsequent Act, and which it would not have been possible to make under Act XVI. of 1838."—ED.

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of one year from its date. That the Mámlatdár's is a "summary decision," we think, is true. It falls fairly within the definition of a summary decision given by L. JACKSON, J., at 2 Beg. L. R. 236, and the inquiry is of the same kind to which Sec. 4 of Reg. VIII. of 1827 applies the phrase "summarily investigate." But though it is thus a summary decision of a Civil Court, a suit brought to upset the title on which it rests, is not, in our opinion, a suit to set aside the order itself. As Sir B. Peacock said in the Full Bench case of *Loknarain Singh v Ranee Myna (b)*: "If the summary order made under this Act is to be no impediment to bringing a regular suit, there is no necessity for setting aside that order." The order is essentially a provisional one, and when the possession, on which it rests, is changed by a decree of a competent court, it ceases along with its cause. A suit for possession in opposition to that recognized by the Mám-latdár's injunction is not, therefore, within the limitation prescribed by clause 5 of Sec. 1 of Act XIV. of 1859. The present was, we think, such a suit, and we must reverse the decree of the District Judge, pronouncing it barred by limitation, and remand the cause for retrial and a new decree upon the merits. Costs to follow the final decision.

Decree reversed and suit remanded.

(b) 7 Cal. W. R. Civ. R. 200.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 334 of 1873.*1873
September 22.UDARA'M SITA'BA'M *Defendant and Appellant.*SONKA'BA'I', WIDOW OF NA'NA'. *Plaintiff and Respondent.**Hindu Law—Son's Widow—Ill-treatment—Separate maintenance by Father-in-law.*

A Hindu father-in-law is legally bound to maintain his deceased son's widow, notwithstanding that no property left by the son may have come into his hands.

Where a father-in-law performs this duty in an imperfect manner—as by ill-treating the widow and turning her out of his house, the Civil Courts will award her separate maintenance.

THIS was a special appeal from the decision of A. Bosanquet, Judge of Ahmadnagar, confirming the decree of Purushottamráv Shiddheshwar Biniwálé, First Class Subordinate Judge of that district.

The plaintiff, a Hindu widow, sued her father-in-law for separate maintenance. The defendant, *inter alia*, pleaded that he was not liable, as no property belonging to his son had come into his hands. The Courts below, finding that the defendant had ill-treated his daughter-in-law and turned her out of the house, awarded her separate maintenance.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Bahiravnáth Mangesh appeared for the special appellant. His arguments and cases cited by him appear in the Court's judgment.

Shivashankar Govindrám, for the respondent, was not called upon to reply.

WEST, J. :—The District Judge has found in this case that the plaintiff was ill-used by the family of her father-in-law, and that the father-in-law himself turned her out of his house. On these grounds he has awarded her a residence in the family house, and a separate maintenance of Rs. 10 a month with two years' arrears. It is now contended that as

1873. the plaintiff's husband left no property that has come into
 UDARA'M SI. his father's hands, the father is not legally bound to main-
 TA'RA'M. tain his son's widow. But, at any rate, it is urged all that
 v she can claim is a subsistence as a member of the father-in-
 SONKA'BA'I'. law's family. The Hindu law no doubt contemplates that
 on the death of a married son his widow shall continue a
 member of the father's family, but while it imposes on her
 this necessity and the duty of attendance to the father-in-
 law's needs and commands, it exacts from the father-in-law
 and those over whom he has control reasonably kind and
 considerate treatment. The father-in-law, who is subject
 to the duty of maintaining his daughter-in-law, cannot shake
 it off by treatment which will hasten her death or force her
 to quit his family. If there is a legal duty at all, it is one
 for the imperfect performance of which our Courts will, and
 must, find a remedy in the award of a separate maintenance.

Is it then a legal duty or one of moral obligation only? In
 support of the latter view, the case of *Khetramani Dasi v.*
Kashinath Dass (a) has been cited, and there are no doubt
 opinions expressed by some of the learned Judges in that case
 which would make the father-in-law's obligation to support
 his daughter-in-law a merely moral one. But that case was
 one of a simple election by a widow of a son, who had died
 without property, to reside with her own family instead of his.
 It is quite consistent that in such a case—she failing to per-
 form the part assigned to her by the Hindu law—she should
 not be entitled to any separate maintenance, and yet that
 when she had been turned out of the house of her father-in-
 law, she should have such a claim. That such a claim is in
 accordance with the Hindu law of this side of India may be
 considered an established doctrine of this Court. In the
 case of *Chandrabhagabai v. Kashinath* (b), the decision of the
 Joint Judge that the plaintiff had no claim for maintenance
 on her husband's father (they having been separate in estate)
 was reversed, and the Court below was directed to ascertain
 her present circumstances. This case was cited and followed

(a) 2 Beng. L. Rep. A. C. J. 15.

(b) 2 Bom. H. C. Rep. 323.

in *Timáppá v. Parmeshríámmá* (c), and there are other decisions to the same effect. The result is that the Hindu law, which still, notwithstanding separation, leaves to the other members of the family an interest in the property of the separated member to be realized on his widow's death, conversely gives to him and to his widow a claim to maintenance if, through destitution, they should come to need it. In the case of *Bái Lakshmi v. Lakshmíás* (d), the right of a step-mother was recognized, though, on the partition of the property, she had received a share in lieu of maintenance, and had thus in a manner contracted herself out of her original right. The right is in truth inalienable according to the dominant principles of the Hindu law, and if the corresponding duty is not voluntarily rendered, it must be enforced.

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We must therefore, confirm the decree of the District Judge with costs.

NA'NA'BHA'Í HARIDA'S, J. :—I entirely concur in the judgment just delivered. It is clearly found in this case by the District Judge that "the defendant's people ill-treated the plaintiff and that he turned her out of his house." This is a finding which must be accepted by us as final. According to Hindu law, among the duties of the head of a family, that of maintenance by him of all the dependent members of that family is considered "a primary duty": 1 Str. H. L. 67. "Who leaves his family naked and unfed," says Brihaspati, "may taste honey at first, but shall afterwards find it poison:" 1 Str. H. L. 68.

There can be no question but that the widow of a son is a dependent member of her father-in-law's family. She is, therefore, entitled to claim maintenance from the head of that family—her father-in-law. It is true that the Hindu law supposes that as such dependent member she will live with, and under the protection of, her father-in-law, rendering to him, in return for such maintenance, obedience and domestic services which the same law enjoins upon her. But

(c) 5 Ibid. A. C. J. 130. (d) 1 Ibid. 13.

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where he chooses of his own accord to dispense with that obedience and those services, and compels her by ill-treatment to live separate, she does not thereby become less entitled to claim her maintenance from him; nay, it would seem to have been held by Her Majesty's Privy Council that even where she leaves her husband's house without any ill-treatment or expulsion, she does not lose her right to maintenance, unless she does so for purposes of unchastity or for any other improper purpose: *Rajah Pirthee Singh v. Ranee Raj Kower* (e). And this right of hers would seem to be quite independent of any property acquired by her father-in-law from his deceased son as well as of any ancestral property in which such son had a joint interest with him. She is entitled to claim maintenance from her husband's relatives *whenever she is in need*: 1 Str. H. L. 172, 175, 245, 246. Such is the view of Hindu law taken on this side of India: *Bái Lakshmi v. Lakhmidás* (*supra*); *Chandrabhágábái v. Káshináth* (*supra*); *Timáppá v. Parmeshriámmá* (*supra*).

The Calcutta case cited by Mr. Bahiravnáth differs somewhat from the present one, inasmuch as there the widow, who claimed separate maintenance, had elected to live separate from her father-in-law. There was not even an allegation of any ill-treatment; whereas here ill-treatment of the plaintiff by her father-in-law is distinctly held proved. Her living separate then is not by her own election, but by her father-in-law's expulsion of her from his house. She surely does not forfeit her right to be maintained by the surviving member of the joint family, of which her husband was a co-parcener, by the fact of that member forgetting his own position and responsibilities. If it were otherwise, heads of families, so inclined, might easily render their houses too warm for widowed relatives to live in with the object of getting rid of their liability to maintain them.

(e) 20 Cal. W. R. Civ. R. 21.

[APPELLATE CIVIL JURISDICTION.]

*Referred Case No. 126 of 1873.*1873.
November 25.MA'DHAVBHA'I SHIVBHA'I *Plaintiff.*FATTESING NATHUBHA'I *Defendant.**Promissory note or bill of exchange payable on demand—Limitation—Act IX. of 1871, Schedule II., Art. 72.*

Under Act IX. of 1871, Schedule II., Article 72, limitation begins to run on a bill of exchange, or promissory note, payable on demand, (not accompanied by any writing, restraining, or postponing the right to sue,) at the time when the demand is first made; and if the first demand is complete and unqualified, the period of limitation must be regarded as beginning to run from the time of such first demand.

Quære whether the bringing of an action to recover the amount due on such bill, or promissory note, should be regarded as a sufficient notice?

Jeeunnissá Ládlí Begam Sáheb v. Mánikji Kharsetji (7 Bom. H. C. Rep. 36, O. C. J.) referred to and distinguished.

THE following questions were submitted for the consideration of the High Court by Gopálráv Hari Deshmukha, Judge of the Small Cause Court at Nariad :—

“1. Whether on the promissory note, of which a certified copy is annexed, the cause of action should be held to have arisen on the day on which the note was passed, or from the date on which demand for the money was made ?

“If the Court decide that the cause of action accrued on the latter date, the following further question will arise :—

“Whether or not the demand should be the first one made after the passing of the note ?

“2. The plaint in this suit was filed on the 1st August 1873, and the plaintiff asserts therein that his cause of action arose in the month of May 1872, when he first made a demand upon the defendant for the money. It will be seen that the bond sued upon was passed on the 20th June 1869. The defendant pleads that the claim is barred by the law of limitation; that the cause of action accrued immediately on the passing of the note, and the suit is brought after the lapse of more than three years from that date.

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"3. The plaintiff has produced two witnesses to prove that he made the demand in May 1872.

"4. In *Jeáunnissá Ládlí Begam Sáheb. v. Mánikji Khar-setji* (a) it was held by WESTROPP, J., that 'in the case of ordinary notes payable on demand, the words "on demand" do not constitute a condition precedent, but merely import that the debt is due and payable immediately, and, therefore, on a bill or note payable on demand, the Statute of Limitation has been held to run from the date of the instrument, and not from the time of the demand: *Christie v. Fonsick* (b), Byles on Bills, p. 320, 8th Edn. This is so even where the note is made payable with interest, as here: *Norton v. Ellam* (c).' Subsequently, however, to this decision, Act IX. of 1871 has come into operation, Article 58 of the second schedule (first division) of which enacts, that in suits 'for money lent under an agreement, that it shall be payable on demand,' the limitation of three years 'begins to run when the demand is made;' and the question is whether or not the ruling above quoted has been superseded by this statutory provision.

"5. In the case of *Poorao Chandra Dutt v. Gopal Chunder Dossebal* (d), the Calcutta High Court has held that in a case of promissory note payable on demand, the parties to which are Hindus, limitation begins to run from the date of the demand,' and at p. 224 of 14 Calc. W. Rep., the same court has held that 'where money is lent payable on demand with interest payable at a certain date, so long as the borrower observes his part of the contract, by paying interest, and so long as he is not apprised of the lender's desire to have back his principal sum, there is no cause of action, and limitation does not begin to run.'

"6. It is, however, a question whether the parties to such notes really contemplate at the time of entering into the contract that the money lent shall be repayable on the making of a demand, and not before. The words '*járe*

(a) 7 Bom. H. C. Rep. O. C. J. 36.

(b) Selwyn's N. P., p. 351, 9th Ed.

(c) 2 M. & W. 461.

(d) 17 Calc. W. Rep. Civ. R. 87.

dhani máge tyáre apiye ' (will pay whenever the lender shall demand) might be said to be merely formal ones, as they occur almost in all money bonds without exception, even in those in which a particular date is specified for re-payment.

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"My own opinion upon the questions is that the cause of action should be considered to have arisen from the date of demand as provided by clause 58, Schedule II. of the new Limitation Act; and the demand for this purpose should be no other than the first."

The reference was considered by WESTROPP, C.J., and PINHEY, J., on the 25th November 1873.

WESTROPP, C.J. :—The Judge of the Court of Small Causes at Nariad in substance inquires :—1st, whether the period of limitation prescribed by Act IX. of 1871 on the promissory note, a copy of which he has annexed to the case, runs from the date of the note, or from the time of the demand? The note was payable on demand. The phrase employed by the Judge "when *the cause of action* shall be held to have arisen" does not seem to be applicable to Act IX. of 1871: See Sec. 4. Article 72 in the second schedule (not Article 58 mentioned by the Judge) furnishes a conclusive answer to the Judge's first question. Article 72 provides that the period of limitation shall begin to run on a bill of exchange or promissory note, payable on demand, (and not accompanied by any writing, restraining, or postponing the right to sue,) at the time when the demand is made.

The Judge has referred to *Jeáunnissá Ládli v. Mánikji Kharselji* (*supra*). In that case, however, the defendant was a Pársi, resident in the island of Bombay, to whom English law, so far as it was not controlled by the Indian Legislature, was applicable. Act XIV. of 1859 made no special provision as to when the cause of action on a bill of exchange, or promissory note, payable on demand, should be regarded as having accrued. The English law is that, on a bill of exchange or promissory note, payable on demand, the

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statute of limitation runs from the date of the instrument, and not from the time of the demand. See the cases cited, in the above mentioned case in 7 Bombay H. C. R. 36, and *Dick v. Gourney* (Irish Term Reports 242), *Collins v. Benning* (12 Modern Reports 444), and *Capp v. Lancaster* (Cro. Eliz. 548). Whether that rule would, before the coming into force of the new Limitation Act of 1871, have been applicable to Hindus, or Muhammadans, in respect of *hundis*, or notes, drawn up in the forms usual amongst natives of India, it is unnecessary now to consider. It is sufficient to say that Article 72 of the second schedule annexed to the new Limitation Act is applicable alike to Hindus, Muhammadans, Pársis, and others, either in the island of Bombay or elsewhere in British India.

The second question put by the learned Judge is :—
 “Whether or not the demand should be the first one made after the passing of the note?” To that we reply that, if the first demand has been a complete and unqualified demand, we think that the period of limitation must be regarded as beginning to run from the time of such first demand. Whether, as has been heretofore held, the bringing of an action to recover the amount due on the bill or promissory note should be regarded as a sufficient demand, it is not necessary for this court now to give an opinion.

As to the 6th paragraph of the case, submitted by the learned Judge for our consideration, we only say that it must always be a question of the true construction of the bill or note itself, whether or not it is payable on demand.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 323 of 1873.*1873.
September 13.

KACHU BAYA'JI.....Plaintiff and Appellant.

KACHOBA' VITHOBA' and

MAGAN DULLABHDefendants and Respondents.

Assignment of a chose in action—Consideration—Hindu Law—ale—Possession.

The question whether an assignment of an equity of redemption admitted by the assignor, was made for a valuable consideration or not, is no material in determining the rights of the assignee against a party who holds adversely to the assignor.

According to Hindu law, a change of possession is necessary to complete a sale of corporeal property, in order to prevent successive purchasers from being cheated by successive sales of the same property, and to obviate disputes as to what was really sold. A purchaser from a Hindu vendor, who buys corporeal property without possession, does not thus obtain a title, which in a suit for specific performance against the vendor, he can enforce against a person actually in possession under a title adverse to the vendor by joining that person as a defendant.

THIS was a special appeal from the decision of E. T. Candy, Extra Assistant Judge of Tháná, at Násik, confirming the decree of Narso Hari Apte, Subordinate Judge, Second Class, of Yevla.

The facts of the case, in so far as they are material, are as follows :—

The second special respondent, Magan Dullabh, who was the second defendant in the Court of first instance, in his written statement said that he was the mortgagee of a piece of property from a son of the first defendant, Kachobá; and was in possession. The plaintiff alleged, on the other hand, that he was the purchaser of the identical property from Kachobá and sought to recover possession. The purchase was subsequent to the mortgage, and was also impeached as a merely colourable and fraudulent transaction.

The Courts below held the plaintiff's deed of sale fraudulent, as being one without a valid consideration, and rejected his claim.

1873. The special appeal was heard by WEST and PINHEY, JJ.

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Rávsáheb V. N. Mandlik, for the second respondent, was called upon to support the judgment appealed against. He argued:—That the first respondent could not gratuitously sell his right in the property to the plaintiff. The transaction is on the face of it fraudulent and set up to defeat the mortgagee's just claim. Moreover, what the first respondent professes to sell is not the equity of redemption in this property but the property itself, for the deed of sale includes many other properties which were never mortgaged. The Hindu law requires possession to be delivered up to the purchaser to make his purchase valid; and possession was admittedly with my client.

The first respondent did not appear in person or by pleader.

Girdharlál Dayáldás for the special appellant:—The question of consideration ought not to have been inquired into in this case. It is immaterial; and the first respondent has admitted the sale.

There is no evidence whatever in the case to support the finding of fraud. The Hindu law does require possession to complete the sale; but the plaintiff's deed may be looked upon as an agreement to sell, and this suit one to compel specific performance thereof.

WEST, J.:—The Assistant Judge has rejected the claim of the plaintiff in this case on the ground that the consideration for the alleged sale by the vendor to the plaintiff was not proved. We do not think that that was a material circumstance with reference to the rights of the plaintiff against a party holding adversely to the vendor. An assignment of his right might be made by the vendor, and his admission of such assignment made proof of it and of its consideration unnecessary.

When we look into the documents in the case, however, we find that the vendor professes to sell to the plaintiff not

any chose in action or incorporeal right. He professes to sell to him various parcels of property in his own possession. One of those parcels is the house which the plaintiff now seeks to recover. It is perfectly clear from the proceedings that, at the date of this transaction, the house was not in the possession of the vendor, but in the possession of the defendant Magan. The vendor, therefore, sold what he could not sell according to the Hindu law, as laid down in *Hárjivan Anandráam v. Náran Haribháí* (a). The texts there cited make a transfer of possession equally necessary to the completion of a sale as of a gift, and the delivery of possession of things having a material existence is regarded by the Hindu law as essential to their legal transfer. Such appears to be the principle of the decision in *Girdhar Parjárám v. Dáji* (b). Until the transfer is thus completed, the vendee has an equitable right, because the conscience of the vendor is affected, which he can enforce against the latter, so as to compel him to make his engagement good; but he has not, until that process has been gone through, a real right in the property itself, capable of exercise against a possessor standing on a right adverse to the vendor's. It has been argued that the plaintiff can sue for specific performance against his vendor, and that Magan, being in possession, is properly joined as a defendant. But in *De Hoghton v Money* (c), Lord Justice Turner says:—"I take it to be well settled, both upon principle and authority, that a mere stranger, claiming under an adverse title, cannot be made a party to a suit for specific performance. There is no equity against him independently of the agreement, and the agreement to which he was not a party, cannot create such an equity." These words may be applied to the case of Magan sued by the plaintiff in this case. He is not to be called on to defend his right against the plaintiff without gaining a protection for it against a suit, substantially identical, which may afterwards be brought by his present co-defendant.

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(a) 4 Bom. H. C. Rep. A. C. J. 31. (b) 7 Idem. 4.

(c) L. R. 2 Ch. 170.

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We may observe that the English law looks with disfavor on sales of real property by persons not in possession as partaking of maintenance and champerty (4 Steph. Com. 318). Coke on Littleton (p. 369a) says :—" If *A* be disseised in this case, *A* hath a good lawful right, yet if *A* being out of possession granteth to or contracteth for the land with another, he hath now made his good right of entry pretended within the Statute (32 Hen. VIII c. 9), and both the grantor and grantee within the danger thereof. *A fortiori* of a right of action ;" but the Hindu law requires a change of possession to accompany sale in order to prevent successive purchasers from being cheated by successive sales of the same property, and to obviate disputes as to what was really sold. The badge of effectual sale, delivery of possession, is wanting, and cannot be supplied where the vendor has no possession to deliver. Such was the case here. The plaintiff, therefore, took nothing by his purchase in this case as against the real defendant Magan. The first defendant, Kachobá Vithobá, was introduced as vendor, merely in order to furnish the plaintiff with a defendant having an apparent privity with him. His interests are really identical with those of the plaintiff. We, therefore, confirm the decree of the Assistant Judge with costs.

It is to be understood, - It will be understood that this judgment is not intended in any way to limit the power of a mortgagor though out of possession to deal in good faith with his equity of redemption as such.

[APPELLATE CIVIL JURISDICTION.]

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December 11.*Special Appeal No. 435 of 1872.*RA'MAYA' ELA'PA' *Plaintiff and Appellant.*MUHAMADBHA'I son and heir of
the deceased DA'DA' MA-SUMBHA'I..... *Defendant and Respondent.**Plaint—Date of Presentation of Plaint—District Court—Limita-
tion—Civil Procedure Code, Secs. 8 and 246.*

Where a plaintiff presented a plaint to the District Court, the Subordinate Judge's Court, in which he ought to have presented it, being then temporarily closed, it was held that the District Court could not be considered a Court of first instance, competent to receive the plaint.

The decision in *In re Sadashiv* (5 Bom. H. C. Rep. A. C. J. 117) overruled; and *Motilal Ramdas v. Jamnadas* (2 Idem 42) followed.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmadnagar, reversing the decree of the Principal Sadar Amin of the same place.

The plaintiff, Rámaya, had obtained a decree against Syad Abdul Rahmán, and in execution of it attached a house as the property of his judgment debtor. That attachment, however, was removed by an order, dated the 6th March 1867, on the application of the defendant Dádá Masumbháí, under Sec. 246 of the Civil Procedure Code. Rámaya, therefore, brought the present suit to establish the right of his judgment debtor to the house in question. The plaint was not filed till the 14th March 1868, instead of within one year from the date of the order as prescribed by that section, in consequence of the Principal Sadar Amin's Court being closed from the 4th to the 13th March 1868, both days inclusive, and the Judge of the District Court, on its being presented to him, refused to receive it on the ground that his was not the proper Court to receive it. The defendant, therefore, objected that the action was barred under the provisions of Sec. 246, Civil Procedure Code, as it was not brought within one year from the date of the

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order in the summary proceedings held under that section. The Principal Sadar Amin at first held the claim barred under that section, but, on remand of the case by Mr. Richardson, the District Judge, in appeal, decreed in the plaintiff's favour. On a second appeal by the defendant, Mr. Bosanquet, the District Judge, rejected the plaintiff's claim as barred.

The appeal was heard before WESTROPP, C.J., and MELVILL, J.

Ghanashám Nilkanth, for the special appellant, cited *In re Sadáshiv* (a).

Gánpatráv Bháskar for the respondent:—The District Judge's Court was not a Court of the lowest grade, within the meaning of Sec. 6 of the Civil Procedure Code, and, therefore, the presentation of the plaint to that Court did not save the plaintiff's claim from being barred. He cited *Motilál Rámdás v. Jamnádas* (b).

WESTROPP, C.J. :—Having regard to Sec. 6 of the Civil Procedure Code, this Court is of opinion that the only argument, upon which the decision in *In re Ganesh Sadáshiv* (*supra*) could be supported, would be that when the Subordinate Judge's Court is closed, the Court of the District Judge is the Court of first instance, which argument is inconsistent with the previous decision of the High Court in *Motilál Rámdás v. Jamnádas* (*supra*) a decision which this Court deems to have been correct in principle. It would be not only unsupported by any enactment known to this Court, but highly inconvenient to hold that whenever a Subordinate Judge's Court is closed for a few days, the District Court becomes the Court of first instance in cases in which ordinarily the primary trial must be held by the Subordinate Judge. Under the circumstances of this case, which render it somewhat a hard one to the special appellant, the decree of the District Judge is affirmed without costs of the special appeal.

Decree affirmed.

(a) 5 Bom H. C. Rep. A. C. J. 117.

(b) 2 Idem 42.

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[APPELLATE CRIMINAL JURISDICTION.]

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December 17.

REG. v. AMRITA' GOVINDA'.

Confession—Code of Criminal Procedure, Sections 45, 122, 256, 280, and 346—Indian Evidence Act, Secs. 30, 91—Abetment—Indian Penal Code, Sec. 114—Joint trial—Trial by Jury—Admission of improper evidence—Retrial.

A confession, not taken in the form of question and answer, and not authenticated by the Magistrate's endorsement as to its accuracy, is inadmissible in evidence, even though no objection should be made to its reception : Secs. 45, 122, 256, and 346 of the Code of Criminal Procedure and Sec. 91 of the Indian Evidence Act.

If an abettor of a crime is, on account of his presence at its commission, to be charged under Sec. 114 of the Indian Penal Code as principal, his abetment must continue down to the time of the commission of the offence. If he distinctly withdraws at any moment before the final act is done, the offence is not committed with his continuing abetment. The confession of a person who says he abetted a murder but withdrew before the actual perpetration of that murder by his associates, cannot be used as evidence against those associates though the person confessing is tried with them jointly on a charge of murder : Section 30 of the Indian Evidence Act.

If, in a case tried by a jury, the High Court finds that inadmissible evidence has been received, but that, after setting it aside, there is other evidence on the record on which the jury may find a verdict of guilty, the High Court may reverse the conviction and sentence, and order a new trial: Sec. 280 of the Code of Criminal Procedure.

THE accused were tried by Baron Larpent, Session Judge of Púna, and a jury, for the offence of murder, and sentenced each to transportation for life.

The appeal was heard by WEST and NA'NA'BAI HARI'DA'S, JJ.

Leith (with him *Shántarám Nárdyan*) appeared for the appellants.

Mayhew, Legal Remembrancer (with him *Dhirajlál Mathurádás*, Government Prosecutor) for the Crown.

The facts, in so far as they are material, appear from the following judgment of the Court :—

WEST, J. :—Exception has been taken by the appellants' counsel to the confessions of the prisoners, Bápu and

1873. Krishná, on which the Session Judge has relied in his sum-
 REG. ming up to the jury, not only as evidence against them-
 v. selves, respectively, but as matter for consideration against
 AMBITA' the other accused under the Indian Evidence Act 1872,
 GOVINDA'. Sec. 30. First, with regard to the alleged confession of the
 prisoner Bápu, which is annexed to the record, it is objected
 (1) that it is inadmissible even as against himself, because
 it has not been taken by the Third Class Magistrate in due
 form as provided by Secs. 45, 122, and 346 of the Code of
 Criminal Procedure, inasmuch as it is not recorded in the
 form of question and answer, and is not completed by an
 indorsement under the hand of the Magistrate to the following
 effect : "I believe that this confession was voluntarily made ;"
 (2) that its purport does not amount to a confession of
 crime on his own part, and is not, therefore, liable to be
 used against the other accused ; and (3) that the confession
 has been extorted by undue influence. It is not necessary
 to deal with the two last mentioned objections, if the first
 be sufficient to exclude the evidence in question from the
 record. It is allowed on behalf of the Crown that the con-
 fession is informal ; but it is contended that it was admitted
 on the record without objection in the Lower Court as sup-
 plemented and rectified by the evidence of the Third Class
 Magistrate who was examined as a witness, and who stated
 that the prisoner duly made the statement recorded. We
 hold, on the authority of the decision of a Full Bench of
 this Court in the case of *Reg. v. Báí Ratan (a)*, that
 the statement in question is inadmissible. The conten-
 tion on the ground of waiver cannot be allowed to
 prevail in a criminal case. Under Sec. 256 of the Criminal
 Procedure Code, it is left to the discretion of the Judge to
 prevent the production of inadmissible evidence, whether it
 is, or is not, objected to by the parties ; and it is the duty
 of this Court to see that this judicial discretion is exercised
 in a proper manner. We are of opinion that the very terms
 of the clause at the end of Sec. 346 show that the confession
 of the prisoner, Bápu, is not admissible. This confession has

(a) Ante p. 166.

not been taken in the course of a " preliminary inquiry." The Third Class Magistrate had no power to hold, and was not engaged upon, any such inquiry. His evidence cannot cure the defects which appear in what is provided for by the law as a species of pre-appointed evidence, and which the law declares to be complete and admissible only when certain forms are complied with in the recording of it.

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We come next to the alleged confession of the prisoner Krishná, which is also annexed to the record. This was recorded by the committing Magistrate, and no objection is raised against it on the ground of informality. It is objected to on the ground that, on a fair construction of it, it is not a confession at all of the crime by the accused on his own part, and that whilst, even if used against him, it cannot fairly operate to his prejudice, it cannot be taken into consideration at all against the other prisoners, jointly tried with him, under Act I. of 1872, Sec. 30. In support of this contention, two cases have been cited at the bar, viz., *Reg. v. Mohesh Biswas* (b) and *Rég. v. Belat Ali* (c).

It appears from Sec. 30 of the Indian Evidence Act that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some others of such persons, is proved, the Court may take into consideration such confession as against such other persons, as well as against the person who made it. It is requisite, then, in order to such use of a confession as is here contemplated, that there should be a joint trial for the same offence. Suppose *A* is charged with murder, *B* with abetting the murder, and *C* with concealing evidence of it, so as to screen the offender; and *C* confesses to the offence charged against him. We think that, in such a case, although the three accused are jointly tried, it is not a joint trial for the same offence; and, therefore, the confession would be inadmissible except against *C* himself. Here, however, there is one offence charged against all the

(b) 19 Calc. W. Rep. Cr. R. 16.

(c) I bid 67.

1873. prisoners. We have, therefore, next to consider whether this
 REG. is a confession within the meaning of the section. We have
 v. come to the conclusion that it is not. The Legal Remem-
 AMRITA' brancer has contended that this is such a confession, because
 GOVINDA' the prisoner has stated in it that, in pursuance of a previous
 arrangement, he went forth with the rest whose common
 object was, if not to kill, at least to beat the deceased ; and
 that he was present at the commission of the offence—facts
 which are sufficient to constitute his guilt that of a principal
 under Sec. 114 of the Penal Code. But if an abettor of a
 crime is, on account of his presence at its commission, to be
 charged as a principal, his abetment must continue down to the
 time of the commission of the offence. At any time before
 that event he may change his mind, and withdraw from the
 abetment. The law allows a *locus pœnitentiæ* in such cases; and,
 if he distinctly withdraws at any moment before the final act
 is done, the offence is no longer committed with his abetment.
 The case, decided by the Calcutta High Court in the 4 Re-
 venue, Civil and Criminal Cases, p. 29, turned on Sec. 107
 of the Penal Code ; and it is quite possible that, in that case,
 the circumstances may have been such as to make the accu-
 sed person responsible for abetment by reason of his presence
 to assist in case of need. In this case, we have to con-
 sider whether the man, who is made a principal from his own
 admission of his presence, can be held, on that admission, to
 have continued in his abetment of the offence committed to
 the last. He admitted going with the rest to the scene of
 the crime according to a preconcerted arrangement for beat-
 ing the deceased ; but, on arriving there, he, according to his
 own account, repudiates the statement that the deceased went
 with his wife, insists that the deceased is a friend of his,
 and strives to dissuade his associates from beating (or killing)
 him. It may be that the Court would attach very little
 weight to the exculpatory parts of this statement, as respects
 the accused person himself who made it. Taken with the
 other evidence, it might well seem to establish the case
 against him. But when the statement is to be used against
 those jointly charged and tried with him, it must be a con-

fession in the strict sense of the term. Its inherent quality must be that of a confession ; but here the inherent quality of the statement by the prisoner Krishná, was not that of a confession, and it cannot, therefore, be used against the other accused, and ought not to have been laid before the jury. We consider that, in this way, a serious error has occurred in the procedure on the trial.

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It remains for us to consider how we ought to deal with the case, seeing that there have been such grave errors in the admission of improper evidence. There is no provision in the Criminal Procedure Code for enabling an Appellate Court to remand a case for a new trial. Sec. 280 of the Code provides only that an Appellate Court may reverse or alter the finding and sentence of the Lower Court ; there is no express authority for remanding such a case for a new trial. On the other hand, Sec. 271 contemplates that an appeal from a conviction in a trial by jury shall be admissible on a matter of law only ; and this seems quite opposed in principle to our putting aside the inadmissible evidence and dealing with the case on the remaining evidence as we might do in a case tried without a jury. The case of *Queen v. Elahee Buksh* (d), appears to be an authority in support of remanding the case for a new trial ; and it seems to have been held in that case that the reversal of a decision on appeal leaves it open to the Appellate Court to order a new trial. That case was decided in reference to Sec. 419 of the Code of Criminal Procedure then in existence (Act XXV., 1861) ; but there is no difference between the terms of that section and those of Sec. 280 in the present Code so far as they are material to the question now under consideration. The case of *Elahee Buksh* has been followed by this Court in two cases, one of which was the case of *Reg. v. Rámswámi Mudliár* (e). The adjudication on questions of fact in such cases appears to have been left by the Legislature (interpreting its words by these decisions) in the hands of a

(d) 5 Calc. W. Rep. Cr. R. 80.

(e) 6 Bom. H. C. Rep. Cr. Ca. 47.

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jury in those districts in which the local Government directs trials of offences to be held by jury ; and if we were to deal with this case as we should do in the ordinary case of a trial with assessors, we should be encroaching upon the functions assigned to a jury. If, indeed, we could say that there was no evidence to go to the jury on which a conviction could reasonably be based, we might fulfil our duty by simply reversing the convictions and sentences. If, on the other hand, we were quite satisfied that, independently of the evidence improperly admitted, there was sufficient evidence to justify the decision, or, in other words, that the prisoners had not been prejudiced by the admission of the illegal evidence, then, having regard to the provisions of Sec. 167 of the Indian Evidence Act, 1872, we should not interfere. The case we have to deal with here, however, lies between the two ; there is evidence remaining after the exclusion of the inadmissible evidence, on which a jury might not unreasonably find the accused or some of them guilty, but it does not seem to us to be conclusive as to their guilt. The interpretation put upon the old Code, admitting the course which we are about to pursue, seems to us to be equally consistent with the provisions of the present Code, and we think this is a case in which we should reverse the conviction and order a new trial.

Conviction and sentence reversed and a new trial ordered.

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 An instrument, which purports to convey two or more properties for a sum of money, composed of items described in the instrument as the values of those properties, is simply a deed of sale coming under the definition of "conveyance" in Act. XVIII. of 1869, Sec. 3. The stamp duty properly leviable upon such an instrument, should, therefore, be calculated upon the aggregate sum specified therein, and not upon the various items composing that sum. *In re Tukarám Hári Atré*354

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 ADMIRALTY—
 The Imperial Statutes 3 & 4 Vict., c. 65, 24 Vict., c. 10, and 26 & 27 Vict., c. 24, do not apply to

the Admiralty or Vice-Admiralty jurisdiction of the High Court.

On that point, *The Asia* (5 Bom. H. C. Rep. O. C. J. 64) followed; *The Portugal* (5. Beng. L. Rep. 323, 330, 331) disapproved.

The High Court, as now existing, was continued, not created, by the Letters Patent of 1865.

The High Court has jurisdiction, under the common maritime law, to entertain a suit in respect of a collision, upon the high seas, between two foreign vessels, although that collision may not have occurred in British or Anglo-Indian waters, and notwithstanding the opposition of the Consul of the State to which the defendant belongs.

Whether the High Court has a discretion to decline to entertain such a suit—*Quære*.

Even if there be such a discretion, the Court will ordinarily allow a suit of that nature to proceed.—*Bardot v. The Augusta*110

ADMISSION—See GUARDIAN AND WARD.

ADMISSION OF IMPROPER EVIDENCE—See CONFESSION, 2.

ADOPTION—

1. To constitute a valid adoption, there must be a gift and acceptance.

When the natural father is dead, and the mother is living, she is the only person who can give in adoption. The Hindu law does not authorize the paternal grand-father or any other person to give in adoption in such a case. *The Collector of Surat v. Dhirsingji*235.

2. *A. B.*, a member of the community of *Jainas* of *Márvádi* origin, who form part of the inhabitants of *Ahmadnagar* in the *Deccan*, died without leaving natural born issue, and without adopting any child. His wife, who survived him, resolved, shortly before her death, on adopting the son of *C. D.*, a brother of *A. B.*, but did not live to carry her intention into effect. After her death, *C. D.* and *E. F.* (another brother of *A. B.*) with the assent of the *Panch* or senior members of their community, went through a ceremony of giving the boy in adoption to the deceased *A. B.* and his deceased wife, and an instrument of agreement wholly founded upon that adoption, was executed by *B. F.* to *C. D.*, and affected to deal with the property moveable and immoveable of *A. B.* :

Held that the adoption was invalid and that the instrument of agreement fell together with it.

Quære whether such an instrument being unregistered, and dealing with immoveable property above the value of *Rs. 100*, was not, upon that ground alone, invalid.

Adoption among *Jainas* is, in the Presidency of *Bombay*, regulated by the ordinary Hindu law, as is their succession to property generally, notwithstanding their divergence from *Hindus* in matters of religion; and Hindu law does not allow any one but the widow to act vicariously for the man to whom the son is to be affiliated; the widow is a delegate either with express or implied authority, and cannot extend that authority to another person, so as to enable him to adopt a son to her husband after her decease; not only a giving but

an acceptance by the man, or his wife, or widow, manifested by some overt act, being necessary to constitute an adoption by Hindu law.

When amongst Hindus (and *Jainas* are Hindu dissenters) some custom different from the normal Hindu Law and usage of the country in which the property is located, and the parties resident, is alleged to exist, the burden of establishing its antiquity and invariability is placed on the party averring its existence, and it should be proved by clear and unambiguous evidence above suspicion—*Bhagwándás Tejmal v. Rájmal* ...241

3. Amongst Hindus, in the Presidency of Bombay, a valid gift in adoption can be made only by the natural father or mother of the son given, or by them both conjointly. They cannot jointly or severally delegate that authority to another person so as to validate a gift by him, made after they are both deceased.

Therefore, a gift in adoption by the brother of the adoptee after the decease of his father and mother, though made with the previous assent of his father, was held to be invalid.

Amongst Hindus, in the same Presidency, an adoption of a son self given, although he may at the time of the gift be an adult, is in the present age (the *Kali Yug*) invalid. *Bashetiáppá v. Shivlingáppá*268

AGENT.—See **BANKER AND CUSTOMER. PRINCIPAL AND AGENT.**

AGREEMENT.—See **DECREE, 2. POWER OF ATTORNEY.**

ALIENATION.—See **STRIDHAN.**

ALIENATION OF UNDIVIDED PROPERTY—

1. It is settled law in the Presidency of Bombay, that one of several parceners in a Hindu undivided family may, without the assent of his co-parceners, sell, mortgage, or otherwise alienate, for valuable consideration, his share in the undivided family estate, moveable or immoveable.

It is also settled law in the same Presidency that a share in the undivided estate of a Hindu family may be taken in execution, under a judgment against the parcener to whom such share belongs, at the suit of his personal creditor. *Vásudev Bhat v. Venkatesh Sanbháv*139

2. Held by a Full Bench, following the doctrine laid down in the preceding case, *Vásudev Bhat v. Venkatesh Sanbháv*, that a Hindu parcener may, without the consent of his co-parceners, alienate his share in undivided family property.

Tukárám v. Rámchandra (6, Bom. H. C. Rep. A. C. J. 247) approved and adopted.

Bajee v. Pandoorung (Morris, Part II., 93) disapproved.—*Fakirápá v. Chanápá*162

AMENDMENT.—See **COLLECTOR, 1.**

ANNUAL RENTAL.—See **MARKET VALUE.**

APPEAL—

1. In criminal cases the High Court will not, in general, grant leave to appeal to the Privy Council, unless some important question of law or practice, or jurisdiction is involved.

Considerations that guide the Court in granting leave to appeal in such cases, stated, and instances in which such leave has been granted, mentioned. *Reg. v. Pestanji Dinshá*75

2. The circumstance that a respondent who has taken, or intended to take, objections, under Sec. 348 of the Code of Civil Procedure, to the decree of the Court of first instance, at the hearing of an appeal already preferred by his opponent, has been prevented by the withdrawal of the appeal from having his objections heard, does not constitute a sufficient cause for admitting a cross appeal by such respondent after the prescribed period, Act IX. of 1871, Sec. 5.

The High Court may consider and determine upon the sufficiency of the reasons which a Judge has given for admitting an appeal after the lapse of the period limited for that purpose by law.

Mowree Bewa v. Soorundarnath Roy, 10 Cal. W. Rep., Civ. R. 178, followed.—*Surbhái v. Raghunáthji* 397

See HINDU LAW, 2.

ARBITRATION.—See AWARD.

ASSESSMENT.—See POSSESSION, 1.

ASSESSMENT IN PERPETUITY—

Where a lease of lands to be reclaimed from the sea by the lessee, granted by a former Government to plaintiff, stipulated that the lands should be held free of assessment [*máphi*] for thirty years, subject to assessment at rupee 1 per *bighá* in the 31st

year, to assessment increasing at the rate of $\frac{1}{4}$ of a rupee per *bighá* during the six following years, and at the expiration of that *istawa* (period of annually increasing assessment) should be held at the full assessment of Rs. 3 per *bighá*:

Held that after the expiration of the first thirty-seven years the lease was one in perpetuity, subject to the annual payment of the sum named as the full assessment and no more.

The words in Section 25 of Bombay Act I. of 1865 confer upon Government no absolute power in all cases to fix any assessment they may please. But that section, as also Section 4, Clause 2, Regulation XVII. of 1827, distinctly limit the power of Government to raise the assessment on land held partially exempt by right. Government, however, may set aside such limitations at their discretion by a Legislative enactment, as provided by clause 3 of the above Regulation. But Government can exercise this power only under "specific" rules.

In Bombay Act I. of 1865, Sec. 25, no such "specific" rules are to be found as would indicate that the Legislature intended to set aside the provisions of Cl. 2, Sec. 4, Regulation 1827, and to enable the Revenue officers to ignore all exemptions except those which they may themselves choose to recognize.

Where plaintiff had enjoyed "Savái Sut," or a remission of one-fourth, for a period of more than thirty years with respect to lands on which assessment became leviable in 1805 A.D., he was held by the High Court to have established a prescriptive right to such a

remission. *The Sub-Collector of Colaba v. Ganesh Moreshtar*...216

ASSIGNMENT—

The question whether an assignment of an equity of redemption admitted by the assignor, was made for a valuable consideration or not, is not material in determining the rights of the assignee against a party who holds adversely to the assignor. *Kachu v. Kachoba*.....491

See INSOLVENCY, 2.

ATTACHMENT—

An attachment will issue to compel a party to a suit to obey an order made by the Commissioner for taking accounts, upon the certificate of the Commissioner that such order has been made and disobeyed, without, in the first instance, making such order a rule of Court.—*Dhurandhardis v. Bhau Govind*4

See DESHMUKHI ALLOWANCE. LIMITATION, 3. PRACTICE.

ATTORNEY'S AUTHORITY.—See POWER OF ATTORNEY.

AULAD DAR AULAD.—See PERPETUITY.

AUTHORITY.—See POWER OF ATTORNEY. PRINCIPAL AND AGENT.

AWARD—

Upon a motion to amend an award, filed under Sec. 327 of the Civ. Pro. Code, on the ground of obvious errors contained in it, it was held that the Court had no power, under Sec. 327, to amend an award or remit it for the reconsideration of the arbitrators, but has only the power to file and enforce the award or reject it. *Alltrakhiti v. Jehangir*.....391.

See SMALL CAUSE COURT, 2.

BANKER AND CUSTOMER.—

A deposited certain moneys with B, a banker, and drew against them, but not to the full extent; the residue was employed on A's account by B, according to an agreement between them :

Held that, besides the ordinary relation of banker and customer, there subsisted also between them that of principal and agent ; that, therefore, the right of action arose at the time of demand. Held also that a three years' limitation applied under Act XIV. of 1859, Sec. 1, cl. 9. *Nasir v. Dayabhai*300

BENA'MI PURCHASE.—See CIVIL * PROCEDURE CODE, SEC. 260.

BILL OF EXCHANGE.—See PROMISSORY NOTE.

BILL OF LADING—

Piece goods were carried from London to Bombay under a bill of lading, the exceptions in which protected the master from "leakage, breakage, rust, decay, loss, or damage from machinery boilers * * * misfeasance error in judgment, negligence or default of * * * persons in the service of the ship * * * and the ship not being liable for any consequences of causes therein excepted, however originating."

The piece goods, on their arrival in Bombay, were found to be damaged by oil and by chafing, i.e., by rubbing against other goods in the hold, but there was no evidence to show how such damage was occasioned :

Held that the term "leakage" did not include leakage from other goods on to the piece goods, nor

did "breakage" include damage caused by chafing, and that, as no negligence was proved, the master was not protected by the exception "damage from negligence." *Graham v. Hille* .. 60.

BREACH OF CONTRACT.—*See* INJUNCTION.

BREAKAGE.—*See* BILL OF LADING.

BROTHER.—*See* ADOPTIOIN, 3.

CAUSE OF ACTION—

Plaintiff's father purchased a house on the 11th June 1854 at a sale made under a decree against *G.D.*, but was not put into possession of it; accordingly, in 1866, he obtained a decree for possession, which, however, was never executed. The defendant in 1870 obtained possession of the house by another sale made in execution of another decree against *G. D.* The present suit was instituted by plaintiff in 1871 :

Held that not only was the remedy on the cause of action, which accrued in 1854, and the decree of 1866 barred, but also that Act XXIII. of 1861, Sec. 11, prevented the plaintiff from bringing a new suit on the fresh cause of action accruing to him under the decree of 1866, as that section "took away from the parties to the suit the right to raise by a fresh suit any question as to their rights and liabilities under the decree." (*Ranganasary v. Shappani*, 5 Mad. C. H. Rep. 375.)—*Kisan v. Anandram*...433

See JUDGE, ACTION AGAINST. SMALL CAUSE COURT, 6.

CERTIFICATE BY ADVOCATE GENERAL.—*See* STATEMENT OF JUDGE. SUMMING UP.

CERTIFICATE OF SALE—

A certificate of sale, issued under Sec. 259 of the Code of Civil Procedure, is an 'instrument' requiring registration within the meaning of Act XX. of 1866, Sec. 17.

Where such a certificate is not registered, other evidence is not admissible to prove the sale.

Per NA NA'BHAI HARIDA'S, J.—An unregistered certificate of sale is not only inadmissible in evidence but invalid. *Padu v. Rakhmai*. 435.

CERTIORARI—

Section CXI. of the Police Act (XIII. of 1856) does not give jurisdiction to the High Court, when a case is brought before it on *certiorari*, to inquire whether the Magistrate has come to a correct conclusion as to the guilt or innocence of the prisoner. The object of that section is to limit the objections to a conviction to some substantial meritorious ground, such as want of jurisdiction or the like, and to prevent a conviction from being quashed on a mere error of form or of procedure. But the section does not give the High Court any right to interfere on the ground that the Magistrate has come to a wrong conclusion on the question of the guilt or innocence of the accused person.

Though affidavits may be used to show a want of jurisdiction in a Magistrate, even though such affidavits contradict for this purpose the finding of the Magistrate, they cannot be used as affording materials for reviewing the Magistrate's decision on the merits.—*Reg. v. Nathalal* ...102

CESSION OF TERRITORY—*See*
JURISDICTION.

CHARGE.—*See* CRIMINAL PROCEDURE
CODE, SECS. 272, 283, 443.

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SEC. 259.—*See* CERTIFICATE OF SALE.

SEC. 260—

A's property is sold under a decree
to *B*, a *bonâ fide* purchaser, who
offers to *A* to re-convey to him on
being repaid the purchase-money.

Held that if *A* accepts the propo-
sal, Sec. 260 of the Civ. Proc.
Code does not preclude a con-
tract from arising. *Mor Joshi*
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SEC. 348.—*See* APPEAL, 2.

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CIVIL PROCESS.—*See* HEREDITARY
OFFICER.

COLLECTOR—

1. A person claiming a share in
land in right of heirship, cannot
sue a Collector for entry of his
name in the revenue books, but
should sue the co-heirs for an
award of a share in the land, or
for a declaration of right to such
a share.

The Collector's book is kept for
purposes of revenue, not for pur-
poses of title, and the fact of a
person's name being entered in
the Collector's book as occupant
of land, does not, necessarily, of
itself establish that person's title,
or defeat the title of any other
person. *Fâtma v. Daryâ Saheb*.
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2. The mere entry of the name of
one parcener in immoveable pro-
perty in the Collector's books, as
the occupant or owner is not
sufficient ground for an action
by a co-parcener against the Col-
lector, inasmuch as the Collec-
tor's books are kept for purposes
of revenue and not for purposes
of title. But if the Collector
improperly enjoin the plaintiff
from taking or other parties
from paying to the plaintiff his
share of the rents or profits, an
action may be maintained
against the Collector. *The Col-
lector of Poona v. Bhavanrâv*. 192

3. Although the entry by a Col-
lector of a particular person's
name as 'occupant' affords, how-
ever mistaken, no ground for an

action against the Collector, yet where there is an apparent and reasonable ground for apprehending legal injury from the Collector's proceedings—as when the Collector affirms one person's title to the exclusion of another, by entering his name in the register of "*watans*" (compiled under Regulation XVI. of 1827, S. 19), or where damage to a person's right is likely to arise from the Collector's act—it is not improper to join the Collector as a party to a suit.

Where a suit is instituted against a Collector and another person, and the Collector does not appeal—

Held that the question of the District Court's jurisdiction to entertain the suit being a ground common to all the parties affected by the judgment, it is open to the other person to object that the plaint did not disclose a cause of action against the Collector, and that the District Court consequently had not jurisdiction. *Sangdya v. Bhimungoda*194

COLLECTOR'S BOOKS.—*See* COLLECTOR, 1, 2, 3. LAND REVENUE, 2.

COLLISION.—*See* ADMIRALTY.

COMMISSIONER FOR TAKING ACCOUNTS.—*See* ATTACHMENT.

COMPOSITION WITH CREDITORS.—*See* INSOLVENCY, 2.

COMPOUNDING OFFENCE—

The offence of voluntarily causing hurt, under Section 323 of the
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Indian Penal Code, is one which may lawfully be compounded, and the withdrawal from the prosecution in such a case is, therefore, permissible under Section 188 of the Code of Criminal Procedure. *Reg. v. Jetha Bhalu*.
68

COMPROMISE.—*See* GUARDIAN AND WARD.

CONCUBINE.—*See* HINDU LAW, 1.

CONFESSION—

1. The confession of an accused person, taken by a Magistrate having no jurisdiction to commit or try him, is imperfect, if not signed by the accused person or attested by his mark, and is inadmissible in evidence. (Secs. 122 and 346, Criminal Procedure Code.)

The term "Preliminary Inquiry" in the final clause of Section 346 means such inquiries as are the subject of Chapters XIV. (of Inquiries and Trials) and XV. (of Inquiry into cases triable by the Court of Session or the High Court) ; and, therefore, that clause does not apply to confessions recorded under Sec. 122, which refers to an inquiry not during a trial or one held with a view to committal, but an inquiry for the purpose of forwarding confessions, when recorded, to the Magistrate by whom the case of the accused person is inquired into or tried. Consequently, when a confession taken under Sec. 122 is inadmissible in evidence, oral evidence to prove that such a confession was made or what the terms of that confession were, is inadmissible also. (Sec. 91 of the Indian Evidence Act.) *Reg. v. Bai Ratan*166

2. A confession, not taken in the form of question and answer, and not authenticated by the Magistrate's endorsement as to its accuracy, is inadmissible in evidence, even though no objection should be made to its reception: Secs. 45, 122, 256, and 346 of the Code of Criminal Procedure, and Sec. 91 of the Indian Evidence Act.

If an abettor of a crime is, on account of his presence at its commission, to be charged under Sec. 114 of the Indian Penal Code as principal, his abetment must continue down to the time of the commission of the offence. If he distinctly withdraws at any moment before the final act is done, the offence is not committed with his continuing abetment. The confession of a person who says he abetted a murder but withdrew before the actual perpetration of that murder by his associates, cannot be used as evidence against those associates though the person confessing is tried with them jointly on a charge of murder: Section 30 of the Indian Evidence Act.

If, in a case tried by a jury, the High Court finds that inadmissible evidence has been received, but that, after setting it aside, there is other evidence on the record on which the jury may find a verdict of guilty, the High Court may reverse the conviction and sentence, and order a new trial: Sec. 280 of the Code of Criminal Procedure. *Reg. v. Amritá*497.

CONSENT.—See ADMIRALTY. ADOPTION, 3.

CONSIDERATION—

D executed a *Rázinámá* in favor of plaintiff on the 20th August

1868, transferring certain lands to the latter. Plaintiff, after passing the usual *Abuláyat* to the Collector, was put in possession of the lands in question. On the 7th April 1869 *T* obtained a money decree against *D*, and on the 3rd July 1869 attached the lands as belonging to *D*.

Held that if the *Rázinámá* were a real transaction made for a valuable consideration, although entered into with the intention of defeating the execution of the money decree, the title of plaintiff under that *Rázinámá* would prevail.

A sale or mortgage, if real, though made for the purpose of defeating an intended or probable execution, is valid against the execution-creditor. But if it be only a colourable transaction not intended to confer upon the vendee or mortgagee any beneficial interest in the property, but simply to substitute such vendee or mortgagee as a nominal owner in lieu of the real owner (the judgment-debtor), with the object of saving the property from execution, the vendee or mortgagee is a mere trustee, and the judgment-creditor is entitled to attach and sell the property.

A decree of 1862, which plaintiff held against *D*, though time-barred in 1868, was (being then still unsatisfied) held to afford a good consideration for *D's* *Rázinámá* in 1868 in plaintiff's favour.

An executor may pay a debt justly due by his testator though barred by the statute of Limitation, and will in equity be allowed credit for such payment.

The general rule of law is that a consideration merely moral is not valuable consideration, such as would support a promise. But there are instances of enforceable promises which formerly were referred to the now exploded principle of previous moral obligation, and which are still held to be binding, although that principle has been rejected. Amongst those instances is a promise *after full age* to pay a debt contracted during infancy, and a promise in renewal of a debt barred by the law of Limitation. The efficacy of such promises is now based upon the principle that where the consideration was originally beneficial to the party promising, and he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law, and if he promise to pay the debt, he is bound by the law to perform that promise. *Tillakchand v Jitmal*.206

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CONVICTION ON MERITS.—See CERTIORARI.

CO-PARCENER.—See ALIENATION OF UNDIVIDED PROPERTY.

CORRECTION OF OBVIOUS ERROR.—See Award.

COTTON FRAUDS ACT—

To constitute the offence of offering adulterated cotton for compression under Sec. 8 of Bombay Act IX. of 1863, it is not necessary to prove that the accused had a fraudulent intention, or that he had knowledge of the cotton having been adulterated, or deteriorated, or mixed, as described in Sec. 2 of that Act. —*Reg. v. Premji Bhagvan* ...295.

COUNTERPART OF LEASE.—See STAMP, 3.

COURT SALE—

A suit was brought by *C* against *A*, "as manager of a firm, and also against the firm itself;" and a decree was passed accordingly. *A* was one of two partners in the firm. The other partner (*B*) was not named in the plaint. In execution of the decree, the right, title, and interest of *A* in a stable, which in fact belonged to the firm, was sold to the plaintiff. A suit is now brought by the plaintiff against *B*, the other partner in the firm, to recover possession of the property—

Held that the plaintiff is in no better position than a purchaser at a sale of partnership property made in execution of a decree against a single partner, and that he cannot be allowed to effect a partial partition, which the judgment-debtor, to whose right he succeeds, would not have been entitled to obtain. All that the plaintiff can do is to bring a suit for an account and settlement of the whole concerns of the firm, and claim that interest in the property, which, upon a final settlement, may be ascertained to belong to his judgment-debtor.
—*Kalyāmbhai v. Motirām* ... 378

CREDITORS.—*See* INSOLVENCY, 2.

CRIMINAL PROCEDURE CODE.

SEC. 4 169, 174, 180
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SEC. 21 71, 169, 174
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SECS. 23, 25, AND 27 71
SEC. 45.—*See* CONFESSION, 2. 173, 180
SEC. 66.—*See* FOREIGN SUBJECT.
SEC. 115 169, 174, 180
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SECS. 272, 283, AND 443—

The omission of the word 'dishonestly,' both in the charge and in

the record of the conviction, is not a ground for reversal of conviction and sentence, where an accused person has fully understood the nature of the offence with which he is charged, and has not been prejudiced by the omission.

Conviction and sentence recorded by a Magistrate, and reversed by the Session Judge upon this ground, restored by the High Court, on appeal directed by Government under Sec. 272, Cr. Proc. Code. *The Queen v. Rukhmá* 373

SEC. 280.—*See* CONFESSION, 2.
SEC. 283 181
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SEC. 357 172, 182
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PREVARICATION.

SEC. 436.—*See* FALSE EVIDENCE.
SEC. 443.—*See* SEC. 272.
SEC. 471.—*See* FALSE EVIDENCE. 172, 180
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SEC. 518 424
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CHAP. XIV. AND XV.—*See* CONFESSION, 1.

CUSTOM, PROOF OF, WHEN VARYING FROM THE GENERAL HINDU LAW.—*See* ADOPTION, 2. LANDLORD AND TENANT, 241.

DAMAGE.—*See* BILL OF LADING. INJUNCTION. LIMITATION, 5. MALICIOUS PROSECUTION.

DATE OF ORDER.—*See* LIMITATION, 1.

DEATH OF INSOLVENT.—*See* INSOLVENCY, 1.

DECISION ON MERITS.—*See* CERTIORARI.

DECLARATORY DECREE.—*See* REVERSIONER, SUIT BY.

DECREE—

1. *A* obtains possession of property under a decree, the decree is subsequently reversed.

Hell 1st, that *A* must restore the property itself, or its actual value as determined by evidence, and not the amount for which it may have been sold; and, 2ndly, under Sec. 11 of Act XXIII. of 1861, that a claim for its restoration need not be the subject of a separate suit, but may be enforced in a miscellaneous proceeding. *Nagindas v. Náthá.* 297

2. An agreement entered into before decree, between a person who subsequently became the decree-holder and the defendant, his debtor, stipulating that the decree should be enforced in a particular manner, is no bar to the execution of that decree according to its terms.

The property of a Hindu which has descended upon his sons and grandsons is, while in their hands, liable to his debts.

Bombay Act VII. of 1866 does not apply to cases in which judgment had been pronounced before its enactment. *Sakhárám v. Govind*361

3. When an Appellate Court reverses a decree in favour of the

plaintiff in a suit, it ought not to stay execution of its own decree under Section 338 of Act VIII. of 1359.

Order of District Court staying execution under such circumstances set aside. *Kávasji v. Dhondiráj*411

See ADOPTION, 1.

DEED.—*See* MISTAKE IN DEED.

DELEGATION.—*See* ADOPTION, 3.

DESHMUKHI ALLOWANCES—

As the holder for the time being of a *Deshmukhi Watan* (an hereditary office) has only a life interest in the allowances pertaining to that *Watan*, such allowances, accruing due subsequently to his death, cannot be attached as part of his estate.—*Hanmantráv v. Bhavántráv*299

DISCRETION.—*See* ADMIRALTY. APPEAL, 2. STAMP, 2. STATEMENT OF JUDGE.

"DISHONESTLY."—*See* CRIMINAL PROCEDURE CODE, SECS. 272, 283, AND 443.

DISOBEDIENCE OF ORDER.—*See* ATTACHMENT.

DISTRICT.—*See* FOREIGN SUBJECT.

DISTRICT COURT.—*See* PLAINT.

DIVISIBILITY OF CLAIM.—*See* PRINCIPAL AND AGENT.

DOWER.—*See* LIMITATION, 7.

DWELLING.—*See* SMALL CAUSE COURT, 6.

EJECTMENT—

A landlord sues to eject his tenant. Other persons setting up a title adverse to the landlord are, at their own request, made parties under Sec. 73 of the Code of Civil Procedure.

Held that these persons cannot, by introducing themselves as parties, change the nature of litigation between the landlord and his alleged tenant; but to establish their superior title, otherwise than through the tenant, they must bring a separate suit. *Ganu v. Moro*429

See LANDLORD AND TENANT.

EMOLUMENT.—*See* HEREDITARY OFFICER.

ENCROACHMENT.—*See* INJUNCTION.

EQUITY OF REDEMPTION.—*See* ASSIGNMENT. PRACTICE.

ERROR.—*See* AWARD. CERTIORARI.

ESTOPPEL—*See* GUARDIAN AND WARD.

EVIDENCE—*See* ADOPTION, 1. CERTIFICATE OF SALE. CONFESSION, 1, 2. GUARDIAN AND WARD.

EXCEPTIONS.—*See* BILL OF LADING.

EXECUTION OF DECREE.—*See* CAUSE OF ACTION. CONSIDERATION. COURT SALE. DECREE, 1, 2, 3. DESHMUKHI ALLOWANCES. HEREDITARY OFFICER. JOINT HINDU FAMILY. PRACTICE. SURETY.

EXTENT OF AUTHORITY.—*See* PRINCIPAL AND AGENT.

FALSE EVIDENCE—

The offence of intentionally giving false evidence in a judicial proceeding cannot be tried by the Magistrate before whom the false evidence is given; this offence, being an attempt to pervert the proceedings of a Court to an improper end, is a contempt of its authority. (Sections 435, 436, 471, 472, and 473 of the Code of Criminal Procedure)—*Reg. v. Navranbeg*73

FAMILY PROPERTY.—*See* ALIENATION OF UNDIVIDED PROPERTY. HINDU LAW, 2.

FATHER'S CONSENT.—*See* ADOPTION, 3.

FATHER - IN - LAW.—*See* HINDU LAW, 3.

FOREIGN SHIPS.—*See* ADMIRALTY.

FOREIGN SUBJECT—

Where a foreign subject, resident in foreign territory, instigated the commission of an offence which, in consequence, was committed in British territory—

Held that the instigation not having taken place in any district created by the Code of Criminal Procedure, the instigator was not amenable to the jurisdiction of a British Court established under that Code, Sec. 66—*Reg. v. Pirtai* 356

FOREIGN TERRITORY.—*See* FOREIGN SUBJECT.

FORFEITURE.—*See* MASTER AND SERVANT.

FRAUD.—*See* HINDU LAW, 2.

FRAUDULENT INTENT OR KNOWLEDGE.—*See* COTTON FRAUDS ACT.

GIFT AND ACCEPTANCE.—*See* ADOPTION, 1, 2.

GOODS.—*See* BILL OF LADING.

GOVERNMENT OF INDIA CAN- NOT CEDE TERRITORY.—*See* JURISDICTION.

GOVERNMENT OFFICER.—*See* JOINDER OF GOVERNMENT OFFICER. MOFUSSIL SMALL CAUSE COURT.

GOVERNMENT REVENUE.—*See* LAND REVENUE.

GRANDSON.—*See* DECREE, 2.

GUARDIAN AND WARD—

The transactions into which guardians enter on behalf of their wards, must secure to the latter some demonstrable advantage, or avert some obvious mischief, in order to obtain recognition in the Courts.

When parties enter into a compromise, or family arrangement, in order to avoid litigating the question, as to whether one of the parties is entitled to certain property or not, such compromise will not be set aside, although it should eventually turn out that the party, taking something under the compromise, was in reality legally entitled to nothing.

But where such a compromise was alleged to have been entered into by a mother, on behalf of two minor sons on the one hand, and an adult member of the family on the other, agreeing to give the latter more than had been awarded by a judicial decision, it was held that the compromise was not binding on the minors.

Apparent acquiescence in such a compromise by one of the minors after arriving at majority, though evidence against him is not evidence of a conclusive character when not continued for any considerable time. *Dharmaji v. Gur-ráv* 311

HEREDITARY OFFICER—

The official remuneration of the officiating hereditary officer is not liable to civil process so long as it is in the hands of the Collector or other disbursing officer, but as soon as it is in the hands of the hereditary officer himself, it is deprived of any special protection. *Ganpatilal v. Sampatram*, 400

HIGH COURT—As now existing, was continued, not created, by the Letters Patent of 1865...110

HINDU FAMILY.—*See* ALIENATION OF UNDIVIDED PROPERTY. JOINT HINDU FAMILY.

HINDU LAW—

1. Among the Sompurá Brahmins a woman who has re-married in the lifetime of her first husband without his consent cannot be regarded as the lawful wife of her second husband, but is entitled to maintenance, as his concubine, from his property.

Quere—Whether consent of her first husband would have rendered the second marriage valid? —*Khemkor v. Umíáshankar*...381

2. Partition can effectually be demanded by a Hindu more than four degrees removed from the acquirer or original owner of the property, sought to be divided,

provided he is not more than four degrees removed from the last owner, however remote he may be from the original owner thereof.

Devalas' text Avibhakta Vibhaktá-nám discussed.

Partition once effected is final and cannot be re-opened on the ground of the inequality of shares. It can be re-opened only in case of fraud, or mistake, or subsequent recovery of family property.

Presumption of union in a Hindu family is stronger as between brothers than as between cousins, and the presumption is weaker the farther from the common ancestor it is.

The proper valuation in the case of an amended plaint is that ascertained at the date of the amendment, and not at the date of the original filing of the plaint. *Moro Vishwanáth v. Ganesh*...444

3. A Hindu father-in-law is legally bound to maintain his deceased son's widow, notwithstanding that no property left by the son may have come into his hands.

Where a father-in-law performs this duty in an imperfect manner—as by ill-treating the widow and turning her out of his house, the Civil Courts will award her separate maintenance—*Odardán v. Sonkábái*483

4. According to Hindu law, a change of possession is necessary to complete a sale of corporeal property, in order to prevent successive purchasers from being cheated by successive sales of the same property, and to obviate disputes as to what was

really sold. A purchaser from a Hindu vendor, who buys corporeal property without possession, does not thus obtain a title, which in a suit for specific performance against the vendor, he can enforce against a person actually in possession under a title adverse to the vendor by joining that person as a defendant. *Kachu v. Kachobá*491

See ADOPTION, 1, 2, 3. ALIENATION OF UNDIVIDED PROPERTY. DECREE, 2. JOINT HINDU FAMILY.

HINDU WIDOW.—See HINDU LAW, 3. STRIDHAN. ADOPTION, 1, 2, 3. MAINTENANCE.

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HURT.—See COMPOUNDING OFFENCE.

ILLEGAL ORDER.—See JUDGE, ACTION AGAINST.

ILL-TREATMENT.—See HINDU LAW, 2.

ILLUM.—See SUMMING UP.

IMMOVEABLE PROPERTY.—See LIMITATION, 4. PRACTICE. STRIDHAN.

IMPLIED CONTRACT.—See ACCOUNT STATED. SMALL CAUSE COURT, 1.

IMPROPER EVIDENCE.—See CONFESSION, 2.

IMPROVEMENT.—See MORTGAGE, 1.

INAM COMMISSIONER'S DECISIONS—

The Inam Commissioner's decisions under Act XI. of 1852, on matters falling within his jurisdiction, are final, except when, and as modified by an appeal to Government in its judicial capacity under the Act, and binding not only upon the *Inámdár*, but upon the Government itself in its executive capacity. Where a

Government officer infringes the rights of an *Inámlár*, thus determined, an action lies against him in the Civil Court. *Vásudev Pandit v. The Collector of Puna* ...471

INAMDA'R.—*See* INAM COMMISSIONER'S DECISIONS. LANDLORD AND TENANT.

INDIAN PENAL CODE—

SECS. 2 AND 3	357
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SEC. 114.— <i>See</i> CONFESSION, 2.	
SEC. 188.— <i>See</i> MAGISTRATE, SECOND CLASS.	
SEC. 228.— <i>See</i> PREVARICATION.	
SECS. 299 AND 300	168
SEC. 411	373
SEC. 511	78

INJUNCTION—

Where the plaintiff and the defendant, being owners respectively of two adjoining houses and the verandahs immediately in front of those houses, agreed that they should keep the verandahs open and not build upon them or divide them by a wall:—

Held that the mere fact that the defendant, when re-building his house, built its new front wall in advance of the plaintiff's, thus encroaching on the defendant's own verandah in breach of the agreement, is not sufficient in itself to justify the Court in granting a mandatory injunction ordering its removal. It should also be satisfied that the new wall so materially interferes with the comfort and convenience of the plaintiff, that the consequences of the breach of agreement cannot adequately be compensated

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by damages. It should also satisfy itself whether the plaintiff protested against the new wall being built, whilst in course of erection, or quietly acquiesced in what the defendant was doing, and only objected when the wall was completed. In the latter case the Court should only award damages. *Ranchhod v. Lallu; Lallu v. Ranchhod*95

INJURY.—*See* COLLECTOR, 3.

INSOLVENCY—

1. The death of an insolvent before obtaining his discharge does not affect the right of the Official Assignee to deal with the property of such insolvent, nor does it cause the proceedings in such Insolvency, so far as the Official Assignee and the creditors are concerned, to abate.

In re Sitarám Abbáji; ex parte Sundardás Mulji.....58

2. Where two insolvent partners, being sued by two of their creditors, and urgently pressed by others, called a meeting of their creditors to consult them as to the course to be adopted, and the creditors at such meeting resolved that the affairs of the insolvents should be wound up, under a deed of assignment in trust for the benefit of their creditors, and, in pursuance of this resolution (which was not shown to have been proposed by or to have originated with the insolvents), a deed of composition was drawn up and executed by the insolvents, whereby they assigned their entire property to trustees for the benefit of all their creditors who, before a certain specified time, should sign the deed.

It was held that, under these circumstances, the composition deed could not be considered a voluntary assignment within the meaning of Sec. 24 of the Indian Insolvent Debtors' Act, and the deed was accordingly up-held. The onus of proving an assignment to be voluntary within the meaning of the above section lies upon the person impugning it.

Whether one of the creditors of an insolvent, without the consent, or without using the name of the Official Assignee, can take steps in the Insolvent Court with a view to have an assignment by an insolvent to trustees set aside as voluntary—*Quære. In re Dhanjibhai Kharsetji Ratnagar*327

INSTIGATION.—*See* FOREIGN SUBJECT.

INTENT TO DEFEAT EXECUTION.—*See* CONSIDERATION.

INTENTIONALLY CAUSING INTERRUPTION TO PUBLIC SERVANT.—*See* PREVARICATION.

INTEREST.—*See* PENALTY.

"INTEREST IN IMMOVEABLE PROPERTY."—*See* LIMITATION, 4.

JAINS, LAW OF SUCCESSION AMONGST, IN BOMBAY PRESIDENCY241

See ADOPTION, 2.

JOINDER OF GOVERNMENT OFFICER—

Where a plaint is presented to the Judge of a district, in which plaint an officer of Government is added as a nominal defendant, no cause of action being alleged against him, the proper course for the District Court to adopt, is either to reject

the plaint, or to call upon the plaintiff to amend it by striking out the name of the officer improperly added as a defendant, and, upon the plaintiff consenting to do so, to return the plaint to the plaintiff for presentation to the court of the lowest grade competent to try it.

Where the District Judge did not adopt this course, but proceeded to try the cause, the High Court annulled his decree, and (the plaintiff consenting to amend his plaint) returned it to him for amendment and presentation to the proper court.—*Shridhar Hari v. Chimá*17

JOINT HINDU FAMILY—

1. It is settled law in the Presidency of Bombay, that one of several parceners in a Hindu undivided family may, without the assent of his co-parceners, sell, mortgage or otherwise alienate, for valuable consideration, his share in the undivided family estate, moveable or immoveable.

It is also settled law in the same Presidency that a share in the undivided estate of a Hindu family may be taken in execution, under a judgment against the parcener to whom such share belongs, at the suit of his personal creditor.

Where a Hindu parcener voluntarily advanced money to his brother and co-parcener, for the purpose of his defence against a charge of forgery, without any previous request, and merely to save the reputation of the family, the obligation, being no more than a moral obligation, was *held* not to be a sufficient consideration to support an assignment to the former by the latter of his share

in the undivided family estate.
*Vásudev Bhat v. Venkatesh San-
 bháv*,139

2. *Held* by a Full Bench, following the doctrine laid down in the preceding case, *Vásudev Bhat v. Venkatesh Sanbháv*, that a Hindu parcener may, without the consent of his co-parceners, alienate his share in undivided family property.

Tukaram v. Ramchandra (6 Bom. H. C. Rep. A. C. J. 247) approved and adopted.

Bajee v. Pandoorung (Morris, part II., 93) disapproved.—*Fakirápá v. Chanápá*162

JOINT TRIAL.—See CONFESSION, 2.

JUDGE, ACTION AGAINST—

A plaint against a Judge, averring that the Judge, knowingly and maliciously issued an illegal order to the plaintiff's injury, does not disclose a sufficient cause of action against the Judge. It must not only aver that the Judge had no jurisdiction, but also that he had no reasonable and probable cause for supposing that he had jurisdiction. *Pralháda Mahátrudra v. A. C. Watt*346

JUDGE'S REFERRING TO DOCUMENTS—

A Judge, in considering, under Sec. 32 of the Civ. Pro. Code, whether he should admit or reject a plaint, is wrong in referring to documents and facts not stated in, or annexed to, the plaint, nor ascertained by him by interrogation of the plaintiff, although such documents and facts may have been on record in other proceedings in the Judge's Court. *Girdharálal v. Jagannáth*182

JUDICIAL DECISION.—See GUARDIAN AND WARD.

JURISDICTION—

The power to cede territory was not one of the powers to which the Secretary of State for India in Council succeeded under Act 21 & 22 Vic. c. 106, when the Government of India was, by that statute, transferred to Her Majesty, inasmuch as such a power was not possessed by the East India Company.

The Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace, as such a law must of necessity affect the authority of Parliament, and those unwritten laws and constitutions of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.

Section 113 of the Evidence Act (I. of 1872) therefore, though not disallowed, is not protected by Sec. 24 of Stat. 24 & 25, Vic. c. 67, and the direction therein contained, that a notification in the *Gazette of India*, that any portion of British territory has been ceded to any Native State, Prince, or Ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification, cannot be followed.—*Dámodar Gordhan v. Ganesh Devráam*.37

See ADMIRALTY. CERTIORARI. COLLECTOR, 3. FALSE EVIDENCE. FOREIGN SUBJECT. JUDGE, ACTION AGAINST. MAGISTRATE, SECOND CLASS. MAGISTRATE, THIRD CLASS. MISTAKE IN DEED. MOFUSSIL SMALL CAUSE COURT. PLAINT. SMALL CAUSE COURT, 1, 2, 3, 4, 5, 6, 7. WRITTEN STATEMENT.

KABULAYAT.—See CONSIDERATION.

KALI YUG.—See ADOPTION, 3.

KHOT.—See LANDLORD AND TENANT.

KNOWN LIMIT.—See PRINCIPAL AND AGENT.

LANDLORD AND TENANT—

The defendants entered on land as tenants of a *Mirásdár* on terms which they could not prove, but held it at a uniform rent for three generations extending over more than fifty years :

Held that the defendants, in the absence of any special agreement to the contrary, had not acquired by prescription a right of permanent tenancy.

Whatever right of permanent tenancy a tenant may, by prescription, acquire as against an *Intámáár*, or a *Khot*, it would be contrary to the custom of the country and to the nature of *Mirás* tenure, to hold that he could acquire such a right as against a *Mirásdár*. *Naráyan v. Lakshuman* 324

See EJECTMENT. SMALL CAUSE COURT, 5.

LAND REVENUE—

1. Where land in a Town in the Presidency of Bombay was found to have been in plaintiff's possession from 1858 to 1871 without any payment by him of Land Revenue to Government :

Held that it was not liable to pay assessment under Bombay Act IV. of 1868.—*Vrijvalabhdas v. The Collector of Ahmedabad*...190

2. Government revenue being a paramount charge on the land, it adheres to the land and to every portion of it independently of the hands into which it passes, or the subordinate rights that may have been created by the occupant out of his own qualified proprietorship ; so that, even after a valid sale of the land by the occupant to a purchaser, who neglects to get his name registered in his books, the Collector may, after giving notice, of the failure to pay the revenue, to the registered occupant—in whom alone, according to the Bombay Survey Act I. of 1865, vests the right of conditional occupancy—put up land for sale, and the purchaser gets occupancy rights free from all claims on the part of the first purchaser. *Gundo v. Mardan*...419

See MORTGAGE, 2. ASSESSMENT IN PERPETUITY.

LEAKAGE.—See BILL OF LADING.

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LETTERS PATENT OF THE SUPREME COURT (1823)—*Sec.* 53 conferred on the Supreme Court the Admiralty Jurisdiction of the High Court of Admiralty in England 113

LETTERS PATENT OF THE HIGH COURT (1862) continued to the High Court the Admiralty Jurisdiction conferred on the Supreme Court by the Letters Patent of 1823, and the Vice-Admiralty jurisdiction created by

commission from the High Court of Admiralty in England, dated the 21st August 1843, and the jurisdiction for the adjudication of prize causes conferred by Stat. 39 and 40, Geo. III., c. 79, s. 25 114

LETTERS PATENT OF THE HIGH COURT (1865) continued to the High Court the Admiralty, Vice-admiralty, and Prize cause jurisdiction continued to it by the Letters Patent of 1862. Opinion of Norman, J., that the Vice-Admiralty Courts Act of 1863 is applicable to the High Court dissented from 115, 118, 119

CLS. 25 AND 26.—See STATEMENT OF JUDGE. SUMMING UP.
SEC. 21 231
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LIABILITY OF SONS AND GRANDSONS.—See DECREE, 2.

LIFE INTEREST.—See DESHMUKHI ALLOWANCES.

LIMITATION—

1. In computing the time for bringing a suit to set aside an order made under Section 246 of the Code of Civil Procedure, the date upon which the order is signed, and not the date upon which it is verbally made, should be considered. *Bápu v. Lakshuman* 19
2. Where a plaint is filed before the expiration of the period of limitation prescribed by Act XIV. of 1859, against persons whom the plaintiff erroneously supposes to be the representatives of his deceased debtor, and after such period has expired, obtains leave to amend his plaint by substituting the true repre-

sentatives as defendants ;

Held that his claim is barred. *Kávasji Sorábji v. Barjorji Sorábji*.
224

3. Suits to enforce the right to share in any property, on the ground that it is joint family property, must be brought within twelve years, exclusive of the period during which the property was under attachment by Government and neither party was in possession.

A custom of primogeniture in the family of *Desái* in the Southern Maratha Country supersedes, if clearly proved, the general Hindu Law of descent.

Case of *Subbaiyá v. Rajeswara* (4 Mad. H. C. Rep. 354) followed. *Shidhojiráo v. Naikojiráo* 228

4. In a suit brought by the plaintiff to establish his right to a *Toda Gíras hak*, and for arrears of it, it was held (reversing the decision of the High Court), that *Toda Gíras* is an interest in immoveable property, and, as such, falls within clause 12, and not within clause 16, of the first section of Act XIV. of 1859.

The term "immoveable property," as used in that Act, is not limited to lands and houses only. It comprehends certainly all that would be real property according to English law, and possibly more.

The principle, which prevailed in *Krishnabhat v. Kapábhat* (6 Bom. H. C. Rep., 137 A. C. J.), and in *Balvantráo v. Purshotam Sidheshvar* (9 Bom. H. C. Rep. 99.), viz. :—'that as the term "immoveable property" is not defined in the Act, it must,

when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as "immoveable," although not so in the ordinary acceptance of that word—approved. *Mahārānā Fatesangji v. Desai Kallianrājaji Hukamatrājaji*281

5. To a suit to recover damages caused by wrongful deprivation of property, the limitation of six years applies under Sec. 1, cl. 16 of Act XIV. of 1859, and not of one year under cl. 2. *Pralhad Mahadrudra v. A. C. Watt*346
6. A suit by a reversioner during a widow's lifetime, to declare a conveyance made by her to be void, must be brought within six years from the date of conveyance, Act XIV. of 1859, sec. 1, cl. 16. *Bhikaji v. Jaganath*351
7. The limitation of six years prescribed in clause 16, Sec. 1. of Act XIV. of 1859, and not clause 12 of that section, applies to a suit by a Muhammadan widow to recover the amount of her dower as her right does not constitute an interest in immoveable property. *Mahabubibi v. Amina*.430
8. Plaintiff's father purchased a house on the 11th June 1854 at a sale made under a decree against *G. D.*, but was not put into possession of it; accordingly in 1866 he obtained a decree for possession which, however, was never executed. The defendant in 1870 obtained possession of the house by another sale made in execution of another decree against *G. D.* The present suit was instituted by plaintiff in 1871.

Held that not only was the remedy on the cause of action, which accrued in 1854, and the decree

of 1866 barred, but also that Act XXIII. of 1861, Sec. 11, prevented the plaintiff from bringing a new suit on the fresh cause of action accruing to him under the decree of 1866, as that section "took away from the parties to the suit the right to raise by a fresh suit any question as to their rights and liabilities under the decree." (*Banganasary v. Shappani*, 5 Mad. C. H. Rep. 375.)—*Kisan v. Anandram*...433

9. *H.* sued a police constable for damages for having made a false report against *H.* The plaint was filed on the 6th May 1872 in the Court of the Subordinate Judge at Malwan. On the 5th August 1872 the Subordinate Judge rejected the plaint on the ground of want of jurisdiction, under Sec. 32 of Act XIV. of 1869. On the 7th August 1872 *H.* filed a fresh plaint in the District Court of Ratnagiri, but the Judge rejected it on the ground that the claim was barred under Section 42 of Bombay Act. VII. of 1867.

In special appeal the High Court affirmed the Judge's order, holding that Sec. 3 of Act XIV. of 1859 cannot be regarded as rendering Sec. 14 of the same Act applicable to Sec. 42 of Bombay Act VII. of 1867. *Hari Ramchandra v. Vishnu Krishnaji*...204

10. Under Act IX. of 1871. Schedule II. Article 72, limitation begins to run on a bill of exchange, or promissory note, payable on demand (not accompanied by any writing, restraining, or postponing the right to sue), at the time when the demand is first made; and if the first demand is complete and unqualified, the period of limitation must be regarded as beginning to run from the time of such first demand.

Quere whether the bringing of an action to recover the amount due on such bill, or promissory note, should be regarded as a sufficient notice?

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A Second Class Magistrate, who issues an order under Sec. 518 of the Criminal Procedure Code, has no jurisdiction to punish for its disobedience by reason of Sec. 473 of the Criminal Procedure Code. *Reg. v. Ranchhod*424

MAGISTRATE, THIRD CLASS—

A Magistrate of the third class can try a person accused of a cognizable offence, who has been forwarded to him by an officer in charge of a police station under Sec. 123 of the Code of Criminal Procedure. *Reg. v. Lálá Shambhu*70

MAINTENANCE.—See HINDU LAW, 1, 3.

MALICE.—See JUDGE, ACTION AGAINST. MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION—

In a plaint, claiming damages for an unsuccessful criminal prose-

cution of the plaintiff by the first defendant, and sanctioned by the second defendant as a Subordinate Judge, the plaintiff (though, stating in the plaint that the second defendant "maliciously and without authority" sanctioned the prosecution, and that the Magistrate, before whom it was brought, held that there was no cause whatever for the charge,) did not allege in the plaint that the 1st defendant prosecuted him (plaintiff) maliciously and without any reasonable or probable cause, or that the prosecution was sanctioned by the 2nd defendant without reasonable or probable cause:

Held that the plaint was properly rejected, and that there was no good ground for allowing the plaint to be amended, the plaintiff having delayed the filing of it until the last day but one allowed by the law of limitation.

Quere—Whether the first and second defendants could properly be joined in such an action?

In every such plaint, plaintiff should name the amount of damages which he seeks to recover as compensation for the injury of which he complains.—*Girdharlál v. Jagannáth*182

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MA'MLATDA'R—

An order of the Court of the Mám-latdár under the last clause of Sec. 1 of Bombay Act. V. of 1864, recognizing the possession of a party and enjoining others from disturbing that possession is not an order under Act. XVI. of 1838; and the limitation of three years, prescribed in Article 7 of Sec. 1 of Act. XIV. of 1859

does not apply to a suit brought to establish a right against the operation of such an order in the regular Civil Court.

Although such an order of the Mámlatdár is a summary decision, the suit in the Civil Court is not a suit to set aside the order itself, but for possession in opposition to that recognized by the Mámlatdár's injunction and is not, therefore, within the limitation of one year, prescribed by Article 5 of Sec. 1 of Act XIV., 1859.—*Bábáji v. Anná*.....479

MANDATORY INJUNCTION.—*See* INJUNCTION.

MARK.—*See* CONFESSION, 1.

MARKET VALUE—

In assessing the market value of house property, situated in the town of Bulsar, acquired for public purposes under Act X. of 1870, the court awarded a capital sum which, at the rate of six per cent. per annum, would yield interest equal to the ascertained annual rental of the premises after deducting the amount necessarily expended for annual repairs. *A. D. Carey v. Banu Miya, A. D. Carey v. Kalu Miya*.....34

MASTER AND SERVANT—

Where a servant, who was engaged by the month, served from the 1st November to the 3rd December 1872, and left his master's service on the 4th December, without giving notice:

It was held that the servant was entitled to be paid his wages up to the end of November but forfeited the wages payable to him in respect of his December services. *Ramji Manor v. F. D. Little*... 57

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MINOR—

A plaint seeking an account under Act XX. of 1864 by a relative of a minor against his administrator, must specify one or more acts of misconduct, or assign some satisfactory reason for apprehending an injury to the estate of the minor by the administrator.—*Dámodardás v. Utamarám* ...414

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MIRA'SDA'R.—*See* LANDLORD AND TENANT.

MISCONDUCT, ACTS OF.—*See* MINOR.

MISDIRECTION.—*See* SUMMING UP

MISTAKE.—*See* HINDU LAW, 2.

MISTAKE IN DEED—

The plaintiff sold to the defendant a field containing a well. Tax was payable to Government on the field as well as a tax on the well. The deed of sale expressly provided for the payment of the tax on the field by the defendant, but was silent as to the tax on the well. Government recovered the amount of the tax on the well from the plaintiff for 1871, as the well stood entered in the Government Books in the plaintiff's

name. The plaintiff sued to recover the amount from the defendant :

Held that under the deed of sale the defendant was not liable to reimburse the plaintiff the amount paid by him to Government :

Held also that if the omission in the deed of sale, to provide for the payment of the tax on the well by the defendant, should have arisen from a mistake, his only remedy was a suit for reforming the deed so as to make it in accord with the actual agreement between the parties at the time of the sale.

The amount and nature of proof required of plaintiff in such a case pointed out.

A Small Cause Court has no power to entertain a suit for the reformation of a deed.—*Gulabhái v. Dayábhái*51

MOFUSSIL SMALL CAUSE COURT—

A suit, within the pecuniary and other limits prescribed for Courts of Small Causes, in which an officer of Government is a party, in his official capacity, may be entertained by a Court of Small Causes in the Mofussil.

The phrase "Local Government" used in Sec. 9, and defined in Sec. 1, of Act XI. of 1865, does not apply to the Collector of a District, but rather to the Governors, or Lieutenant-Governors of Presidencies, or Commissioners of Provinces. *Desáji v. Hemadáli*308

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MORTGAGE—

1. The holder of a field, on the Survey tenure, mortgages it with possession, secured by a registry of the mortgagee's name as occupant. Certain fruit trees, coming under the operation of No. 3 of the Revised Survey Rules, are sold, by the Government, to the mortgagee as occupant :

Held that the trees, by the sale, became a portion of the mortgaged estate, and, as such, liable to redemption, on payment of the amount of the mortgage money with interest, of the money laid out in purchasing the trees, and of other reasonable expenses.

Held also that a suit for redemption of land, without specification of details, includes a claim for restoration of all accretions and improvements which it may have received while in the hands of the mortgagee; and if the Court omits to adjudicate upon part of the claim, the mortgagor is not precluded, by Sec. 7 of Act VIII. of 1859, from bringing a second suit in respect of that part.—*Bakshirám v. Dárku*.....369

2. Where land, in the possession of a mortgagee, is sold by the *Mámlatdár* for arrears of Government land revenue :

Held that as the land revenue is the paramount charge on the land, whoever derives title from the occupant takes it subject to that charge, and that, therefore, the purchaser at the sale was entitled to the land, free from any mortgage lien.—*Abdul Gani v. Krishnáji*416

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- MORTGAGEE IN POSSESSION.**—*See* PRACTICE.
- MUHAMMADAN LAW.**—*See* LIMITATION, 7. PERPETUITY.
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- NOTIFICATION.**—*See* JURISDICTION.
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- OCCUPATION WITH LEAVE OF THE OWNER.**—*See* SMALL CAUSE COURT, 5.
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- PARTNERSHIP PROPERTY.**—*See* COURT SALE.
- PATERNAL GRAND-FATHER.**—*See* ADOPTION, 1.
- PENALTY.**—
- When a promissory note stipulated that, in default of payment of principal within three months after date, interest should run at the rate of 75 per cent. per annum, the increased rate was held to be a penalty and relieved against on payment of interest at 9 per cent. per annum notwithstanding Act XXVIII. of 1855.
- Motoji Ratnaji v. Shekh Husen*, 6 Bom. H. C. Rep. A. C. J. 8., followed; and *Arulu Mastry v. Wakuthu*, 2 Mad. H. C. Rep. 205, and *Brojo Kishore Roy v. Madhub*, 17 Calc. W. R. Civ. R. 373, dissented from. *Pavá v. Govind*. 382
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- Semble.*—To constitute a valid *Wakf* according to Muhammadan law, it is not sufficient that the word "*Wakf*" be used in the instrument of endowment. There must be a dedication of the property solely to the worship of God or to religious and charitable purposes. A Muhammadan cannot therefore, by using the term "*Wakf*," effect a settlement of property upon himself and his descendants, which will keep such property inalienable by himself and his descendants for ever.
- Held* that the plaintiffs, who were sons of a daughter of one of the original settlers, did not come within the meaning of the term *aulad dar aulad* or the term *war-rasan* used in the instrument of

settlement.—*Abdul Ganne Kásam v. Hussen Miyá*7

PLAINT—

1. Rejection of, under Section 32, Civil Procedure Code ...182, 346.

2. Where a plaintiff presented a plaint to the District Court, the Subordinate Judge's Court, in which he ought to have presented it, being then temporarily closed, it was held that the District Court could not be considered a Court of first instance, competent to receive the plaint.

The decision in *In re Sadáshiv* (5 Bom. H. C. Rep. A. C. J. 117) overruled; and *Motilál Rámdás v. Jammúdas* (2 Idem 42) followed. *Rámaya v. Muhamadbháí*.....495

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H. sued a police constable for damages for having made a false report against *H.* The plaint was filed on the 6th May 1872 in the Court of the Subordinate Judge at Malwan. On the 5th August 1872 the Subordinate Judge rejected the plaint on the ground of want of jurisdiction, under Sec. 32 of Act XIV. of 1869. On the 7th August 1872, *H.* filed a fresh plaint in the District Court of Ratnagiri, but the Judge rejected it on the ground that the claim was barred under Section 42 of Bombay Act. VII. of 1867.

In special appeal, the High Court affirmed the Judge's order, holding that Sec. 3 of Act XIV. of

1859 cannot be regarded as rendering Sec. 14 of the same Act applicable to Sec. 42 of Bombay Act VII. 1867. *Hari Rámchandra v. Vishnu Krishnáji*..... 204

POLICE REPORT.—See MAGISTRATE, THIRD CLASS.

POSSESSION—

1. Where land in a town in the Presidency of Bombay was found to have been in plaintiff's possession from 1858 to 1871 without any payment by him of Land Revenue to Government :

Held that it was not liable to pay assessment under Bombay Act IV. of 1868.—*Vrijavalabhdás v. The Collector of Ahmedabad* ...190

2. *A* being out of possession and excluded from the use of a piece of ground for a longer period than six months, sues *B*, who is in possession, to establish a right of way :

Held that *A* must prove either thirty years' user, or a grant by the owner of the ground, for the possession itself constitutes a title against any person failing to prove a better. *Savalgiápá v. Bas-vunápá*399

See HINDU LAW, 4. LIMITATION, 3. MA'MLATDA'R. PRACTICE. SMALL CAUSE COURT, 5.

POWER OF ATTORNEY—

The defendant, on behalf of her minor son, gave to *S.M.* a power of attorney by which she authorized *S.M.* "for her and in her name-and on her behalf to appear in or sue or defend * * * any suit, appeal, or special appeal * * * and to act in all such proceedings in any way in which

she might, if present, be permitted or called on to act :”

Held that the above power did not authorize *S. M.* to enter into a special agreement with a *Vakil*, under which the *Vakil* (in an appeal which he was employed to conduct for the defendant on behalf of her minor son) was to receive for his services a *minimum* reward of Rs. 4,000, and, in case of success, a reward proportional to the amount awarded by the Appellate Court.

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A mortgagee in possession of mortgaged premises that have been attached by prohibitory order under Sec. 235 of the Code of Civil Procedure, in execution of a decree obtained against his mortgagor, is entitled to come in under Sec. 246 of the Civil Procedure Code and have the attachment raised. *Kassiráv v. Vilhal-dás*100

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PREVARICATION—

Prevarication by a witness may, though it does not necessarily,

amount to contempt of court within the meaning of Sec. 228 of the Indian Penal Code and Sec. 435 of the Code of Criminal Procedure. *Reg. v. Jainal, Shravan*69

PRINCIPAL AND AGENT—

A firm of carriers authorize one of their partners to draw bills on the firm to the extent of Rs. 200 each. The partner, acting in excess of his authority, and without the knowledge of the firm, made two promissory notes, in the name of the firm, for Rs. 1,000 each. The plaintiff knew the partner was limited to a particular sum, but also knew that two of his bills for Rs. 300 each had been previously accepted by the firm. In an action on the notes—

Held, 1st, that the firm was not liable for the whole amount drawn; and 2ndly, that the contract, whereon the action was founded, was not capable of division, and, therefore, the firm was not liable to the extent of Rs. 200. *Premábhai v. T. H. Brown*. 319

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In criminal cases the High Court will not, in general, grant leave to appeal to the Privy Council unless some important question of law or practice, or jurisdiction is involved.

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PROMISSORY NOTE—

Under Act IX. of 1871, Schedule II., Article 72, limitation begins to run on a bill of exchange, or promissory note, payable on demand (not accompanied by any writing, restraining, or postponing the right to sue), at the time when the demand is first made; and if the first demand is complete and unqualified, the period of limitation must be regarded as beginning to run from the time of such first demand.

Quere.—Whether the bringing of an action to recover the amount due on such bill, or promissory note, should be regarded as a sufficient notice?

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The accepting of a document for registration, after the expiration of the period mentioned in Part IV. of Act XX. of 1866, is not a mere defect of procedure. The Registrar who registers a document so presented acts without authority. *Ráya Rághobá v. Anpurnábái*98

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RES JUDICATA—

If the plaintiff's present cause of action might and ought properly to have been made a ground of defence in a former suit, brought against him by the defendant, his suit is barred by Section 2 of Act VIII. of 1859.

The father of *A* and *B* having died, *A* alleging that his father's assets amounted in value to Rs. 12,000 and admitting that he (*A*) had

received Rs. 1,000 as part thereof in 1866, sued *B*, whom he alleged to be in possession of the rest of the property, for Rs. 5,000 as the residue of *A*'s share, and obtained a decree for a half share in immoveable property of their father of the value of about Rs. 700 and no more. In 1871 *B* sued *A* for a moiety of the Rs. 1,000, which *A*, in his suit in 1866, had admitted to be in his possession.

Held that such a suit could not be maintained, as the claim on which it was found must be deemed a *res judicata* in *A*'s suit in 1866.
Maktum v. Imám293

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REVERSIONER, SUIT BY—

A suit for a declaratory decree must be brought by the nearest reversioner, but there is no objection to a suit by a more distant reversioner when the prior rights of the nearer reversioner or reversioners have been waived.
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SMALL CAUSE COURT—

1. Suit to recover a share in a *varshāsan* payable by the Gaekwad's Government and received by the defendant as the eldest member of the original grantee's family, is cognizable by a Court of Small Causes in the Mofussil, the claim being one on an implied contract, *viz.*, a contract by the defendant to pay to the plaintiff money received by the defendant to the use of the plaintiff.

Sunkur Lāl Pattuck Gyāwal v. Musamut Rām Kalee (18 Calc. W. Rep. Civ. R. 104) followed.

Keshav Bhat v. Bhāgirthi Bāi (3 Bom. H. C. Rep. A. C. J. 75)

overruled. *Ratanskankar v. Gulābshankar* 21

2. A Small Cause Court has power, under Section 327 of the Civil Procedure Code, to file an award for a sum not exceeding Rs. 500, and to proceed under that section if the defendant reside within the jurisdiction of the Court. *George Bridge v. Edalji; Vithal Ambārām v. Dayābhāi*..... 5

3. A suit to recover less than Rs. 500, levied as assessment by Government officials, is cognizable by a Court of Small Causes, and, therefore, under Sec. 27 of Act XXIII. of 1861, no special appeal lies.

District Judges should, ordinarily, try such suits when brought in the District Court, and should not delegate the trial to their Assistants. *Ramchandra Bhikaji v. The Collector of Ratnagiri*. 305

4. A suit, within the pecuniary and other limits prescribed for Courts of Small Causes, in which an officer of Government is a party, in his official capacity, may be entertained by a Court of Small Causes in the Mofussil.

The phrase "Local Government" used in Sec. 9, and defined in Sec. 1, of Act XI. of 1865, does not apply to the Collector of a District, but rather to the Governors, or Lieutenant-Governors of Presidencies, or Commissioners of Provinces. *Desaiji v. Hemadalli*..... 308

5. Upon a summons issued under Sec. 91 of Act IX. of 1850 by the Judge of the Small Cause Court to the occupier of a house to show by what title he claims to hold or occupy the same or

- part thereof—*Held* that the jurisdiction of the Small Cause Court is not ousted by the occupier appearing and showing as cause that which does not amount to an allegation of title in the occupier. *Held also*, that the words in that section, "without leave of the owner," comprise a case where the original possession was with leave of the owner, but was afterwards withdrawn by his vendee, the subsequent owner. *Dadábhai v. Kuvarbái*386
6. A servant residing within the jurisdiction of one Small Cause Court who has a family house within the limits of the jurisdiction of another Small Cause Court in which his father lives, and which he himself occasionally visits, does not dwell within the local limits of the latter Court within the meaning of Sec. 8 of Act XI. of 1865; and, although the cause of action may have arisen there, a suit against him will not lie in that Court.—*Gendu v. Govind*409
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- SPECIAL APPEAL.—*See* SMALL CAUSE COURT, 3. STAMP, 2, 3.
- SPECIFIC PERFORMANCE.—*See* HINDU LAW, 4.
- STAMP—
1. An instrument, which purports to convey two or more properties for a sum of money, composed of items described in the instrument as the values of those properties, is simply a deed of sale coming under the definition of "conveyance" in Act. XVIII. of 1869, Sec. 3. The stamp duty properly leviable upon such an instrument should, therefore, be calculated upon the aggregate sum specified therein, and not upon the various items composing that sum. *In re Tukarím Hari Atre*354
2. A District Court refused to allow under Act XVIII. of 1869, Sec. 20, an insufficiently stamped document to be admitted on payment of the full amount of stamp duty, and the penalty, on the ground that it was wilfully executed in fraud of the stamp law. *Held* that the High Court cannot in special appeal question the correctness of the District Court's refusal.
- Pendse v. Malse* (3 Bom. H. C. Rep A. C. J. 94) commented on. *Gambhirnal v. Chejmal*406
3. Where an agreement between a mortgagor and mortgagee contains a stipulation that the mortgagor should, at the time of redemption, make good the losses arising to the mortgagee from the default of tenants, which it had been agreed the mortgagee might put in, in case the mortgagor made default in payment of the rent agreed upon for the term of the mortgage; such an agreement is not a lease, or the counterpart of a lease, within the meaning of Reg. XVIII. of 1827 Sec. 10, cl. 3, but is a contract of indemnity against losses to be incurred after the determination

of the lease, which, not having any operation so long as the lease is in existence, is, therefore, not exempt from stamp duty under that Regulation.

Where an appellant has not tendered the stamp duty and penalty on a document which the Courts below have held to be insufficiently stamped, the High Court will not allow him to do so in special appeal.—*Rámkrishná v. Vithu*, 441

STAMPING AN INSTRUMENT AFTER ITS EXECUTION—

Under Regulation XVIII. of 1827, a party has a right to have stamped, on payment of the prescribed penalty, an instrument executed before 1st January 1870, and a Civil Court should receive such instrument in evidence on being stamped, and cannot reject it on the ground of intention by the party to evade the stamp duty.—*Antáji v. Janárdan* 358

STATEMENT OF JUDGE—

The statement of a Judge, who presides at a criminal trial, is, upon a case reserved under the 25th clause of the Charter of the High Court, or upon a case certified by the Advocate General under its 26th clause, conclusive as to what has passed at the trial. Neither the affidavits of bystanders or of jurors nor the notes of counsel or of short-hand writers are admissible to controvert the statement of the Judge.

It is in the discretion of the Judge, who presides at a criminal trial, whether or not he will reserve a point of law for the opinion of the High Court, and such discretion will not be reviewed by the High Court, sitting as a court of review
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STAY OF EXECUTION—*See* DECREE, 3.

STRIDHAN—

A Hindu widow, on this side of India, has no power to alienate immoveable property if given to her by her husband in his lifetime, and thus becoming "Stridhan" in her hands. *Kotarbasápa v. Chanverova* 403

SUIT FOR POSSESSION.—*See* MA'MLATDA'.

- SUIT TO SET ASIDE ORDER.**—*See* LIMITATION, 1.
- SUMMING UP**—
- Semble.*—Non-direction by a Judge is not a matter upon which the Advocate General should grant a certificate under clause 26 of the Letters Patent.
- In considering whether a Judge has misdirected the jury, the tenor and general effect of the whole summing up should be looked at, and if, upon the whole summing up, the court is of opinion that substantially the proper direction has been given to the jury, it will not interfere, though the Judge has omitted to direct the jury expressly on some important point.
- Whether abetment to murder by sorcery, *illum*, or other impossible means, is an offence under the Penal Code.—*Quære.*—*Reg. v. Pestanji Dinshá*75
- SURETY**—
- A surety, who executes a security bond (in Form No. 82 of the High Court Circulars) under Sec. 36 of Act XXIII. of 1861, is liable for the fulfilment of the decree, not only of the Court of Regular, but also of that of the Court of Special Appeal. *Naráyan Dev v. Gajánan Dikshit*..... 1
- TENANCY.**—*See* LANDLORD AND TENANT.
- TENDER OF STAMP DUTY AND PENALTY.**—*See* STAMP, 3.
- TENDERING.**—*See* WRITTEN STATEMENT.
- TERRITORY, CESSION OF.**—*See* JURISDICTION.
- THEFT**—
- Dishonest removal of salt naturally formed in a creek, which was under the supervision of an officer belonging to the Customs Department, constitutes theft, the salt having been legally appropriated by such officer. (Per BAYLEY and WEST, JJ.)
- But removal, for one's own use from a creek, of such salt not legally appropriated, constitutes no offence either under the Indian Penal Code or Acts XXXI. of 1850 or XXVII. of 1837, though under Sec. 7 of the latter Act, made applicable by Sec. 8 of the former, the salt removed becomes liable to detention. (Per LLOYD and KEMBALL, JJ.) *Reg. v. Mansang Bhávsang*.74
- THIRD PARTIES.**—*See* EJECTMENT.
- TITLE.**—*See* COLLECTOR, 1, 2, 3. EJECTMENT. HINDU LAW. 4. MORTGAGE, 2.
- TODA GIRAO.**—*See* LIMITATION, 4.
- TREATY OF NANKIN**116
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- TRIAL BY JURY.**—*See* CONFESSION, 2. SUMMING UP.
- TRUSTEES.**—*See* INSOLVENCY, 2.
- USAGE.**—*See* ADOPTION, 2.
- USER.**—*See* POSSESSION, 2.

VAKIL—

The defendant, on behalf of her minor son, gave to *S. M.* a power of attorney by which she authorized *S. M.* "for her and in her name and on her behalf to appear in or sue or defend * * * any suit, appeal, or special appeal * * * and to act in all such proceedings in any way in which she might, if present, be permitted or called on to act."

Held that the above power did not authorize *S. M.* to enter into a special agreement with a *Vakil*, under which the *Vakil* (in an appeal which he was employed to conduct for the defendant on behalf of her minor son) was to receive for his services a *minimum* reward of Rs. 4,000, and, in case of success, a reward proportional to the amount awarded by the Appellate Court.

Whether such a special agreement as the above is one that the Court would enforce—*Quere. Rāv Sūheb V. N. Mandlik v. Kamal-jubāi*.....26

VALUABLE CONSIDERATION.—
See ASSIGNMENT. CONSIDERATION. JOINT HINDU FAMILY, 1.

VALUATION.—*See* DECREE, 1. HINDU LAW, 2. MARKET VALUE.

VARSHASAN.—*See* SMALL CAUSE COURT, 1.

VENDOR AND PURCHASER.—
See CONSIDERATION. LAND REVENUE, 2. HINDU LAW, 4.

VESTING ORDER.—*See* INSOLVENCY, 1.

VOLUNTARILY CAUSING HURT.—
See COMPOUNDING OFFENCE.

VOLUNTARY ASSIGNMENT.—
See INSOLVENCY, 2.

VOLUNTARY PAYMENT.—*See* JOINT HINDU FAMILY, 1.

WAGES.—*See* MASTER AND SERVANT.

WAIVER.—*See* REVERSIONER, SUIT BY.

WAKF.—

Semble.—To constitute a valid *Wakf* according to Muhammadan law, it is not sufficient that the word "*Wakf*" be used in the instrument of endowment. There must be a dedication of the property solely to the worship of God or to religious and charitable purposes. A Muhammadan cannot therefore, by using the term "*Wakf*," effect a settlement of property upon himself and his descendants, which will keep such property inalienable by himself and his descendants for ever:

Held that the plaintiffs, who were sons of a daughter of one of the original settlers, did not come within the meaning of the term *aulad dar aulad* or the term *warasan* used in the instrument of settlement. *Abdul Ganne Kāsam v. Hussen Miyā*..... 7

WARRASAN.—*See* PERPETUITY.

WATAN.—*See* HEREDITARY OFFICER.

"WITHOUT LEAVE OF THE OWNER.—*See* SMALL CAUSE COURT, 5.

WIDOW.—*See* HINDU LAW, 3.

WITHDRAWAL.—*See* COMPOUNDING OFFENCE.

WRITTEN CONTRACT.—*See* ACCOUNT STATED.

WRITTEN STATEMENT—

The Court has jurisdiction to take a written statement off the file, for irrelevancy, until it is “tendered,” which is when it is produced at the hearing of the suit.

“Relevancy” is to be judged by what the defendant believed to

be material to his case, and not whether it did in fact disclose a good defence to the action.
Keshavji Náik v. Nasarvánji Ardesir Wádia 425

WRONGFUL DEPRIVATION OF PROPERTY.—*See* LIMITATION, 5.

YEARLY TENANCY.—*See* LANDLORD AND TENANT.

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